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Criminal Justice Committee

Victims, Witnesses, and Justice Reform (Scotland) Bill Stage 1 Report

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Criminal Justice Committee

To consider and report on matters relating to criminal justice falling within the responsibility of the Cabinet Secretary for Justice and Home Affairs, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.


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Victims, Witnesses, and Justice Reform (Scotland) Bill – Stage 1 report

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Victims, Witnesses, and Justice Reform (Scotland) Bill – Stage 1 report

INTRODUCTION

The experience of victims and witnesses

1. The Victims, Witnesses, and Justice Reform (Scotland) Bill ("the Bill") was introduced on 25 April 2023.

2. The Bill proposes changes to the law to try to improve the experience of victims and witnesses in the justice system. According to the Scottish Government, the Bill also proposes changes to the criminal justice system to try to improve the fairness, clarity and transparency of the framework within which decisions in criminal cases are made.

3. The Criminal Justice Committee ('the Committee') was designated as the lead committee on the Bill.

4. A significant focus of the Bill is about the experience of victims and witnesses.

5. As a Committee, we have heard on multiple occasions compelling evidence that victims and witnesses are being let down by the way that the justice system operates.

6. Some of the first-hand evidence we heard from survivors of sexual crimes with experience of the justice system was disturbing to hear and pointed to a justice system which is not working from their perspective. A selection of comments from survivors about their experiences is set out below.

Selected views from survivors

"Survivors endure trauma as a result of the abuse that they go through, but, having come through the justice system, I would say that I endured trauma not only from my abuser but from the system that is supposed to provide me with justice. That is not acceptable, and it needs to change."

Hannah McLaughlan

"Survivors of sexual abuse have already had their agency stripped from them, yet they partake in a criminal justice system that further strips it from them. We are treated like outsiders throughout the process."

Ellie Wilson

"As a woman, you are brought up in the world being told that the chances are that it might happen to you. □ou are aware of the complexities, and that you might not get a conviction, but you are not prepared for how badly you are going to be treated by the system and how potentially damaging it will be."

Hannah Stakes

"…when we talk about what happened, each one of us mentions the exact date that our case went to trial. We remember the date that we were raped, but we also remember the date that we went to trial, because they are as traumatic as each other."

Anonymous witness 1

"When you are traumatised, you don't take in information, and when you go through the justice system, it's all on you constantly. You have to make decisions about things that an ordinary person never has to think about."

Anonymous witness 2

7. The Committee has decided to present this evidence upfront in this report as this is the important context in which we are considering the Bill.

8. We will refer to the evidence we received from survivors of sexual crimes throughout this report, as their views have helped shape our thinking about the proposals in the Bill.

Proposals in the Bill

9. The Bill contains several substantial policy proposals.

10. We will, of course, discuss each of the proposals in detail. However, a summary of the key points can be found below.


Part 1
Establishment of a Victims and Witnesses Commissioner for Scotland
Establishes an independent Commissioner for Scotland who is independent from the Scottish Government, and accountable to the Scottish Parliament.
Commissioner's functions and powers:
Promote and support the rights and interests of victims and witnesses
Must take steps to raise awareness and promote the interests of victims and witnesses
Must monitoring compliance with the Standards of Service and the Victims' Code for Scotland
Must promote best practice and a trauma-informed approach by criminal justice agencies and those who provide support services to victims
Investigate whether criminal justice agencies have had regard to the interests of victims and witnesses in carrying out their functions, but not intervene in individual cases


Part 2
Trauma-informed practice
Creates a new legal requirement for criminal justice agencies to have regard to trauma-informed practice. The Victims and Witnesses (Scotland) Act 2014 already sets out range of general principles to which criminal justice agencies must have regard to. Part 2 adds trauma-informed approach to that list in the 2014 Act.
Creates a requirement for justice agencies to have regard to trauma-informed practice, and for Standards of Service they produce to cover trauma-informed practice
Empowers the courts to set rules and procedures on trauma-informed practice in relation to both criminal and civil business.
A requirement for the judiciary to take trauma-informed practice into account when scheduling both criminal and civil court business.


Part 3
Special measures in civil cases
Special measures are practical steps a court can take to help vulnerable litigants and witnesses to be in a courtroom setting with as little fear and distress as possible.
Currently under the law, no adult in a civil case is automatically treated as vulnerable or entitled to special measures. Special measures are also only available where evidence is being taken and witnesses are being cross-examined on it.
Part 3 of the Bill broadly split into the following areas:
It would extend a new approach to special measures found in the Children (Scotland) Act 2020 for certain family cases to civil cases more generally.
It would treat certain categories of witness as automatically vulnerable and would also allow special measures to help litigants in hearings where evidence is not being taken.
It would allow a court to prohibit a litigant from personally conducting their own case and cross-examining witnesses in civil cases.


Part 4
Criminal juries and verdicts
Contains measures reforming criminal trials.
Removes 'Not Proven' as a verdict in all criminal trials, leaving verdicts of 'Guilty' and 'Not Guilty'.
Changes the size of a jury in a criminal trial from 15 to 12 members.
Changes the majority of jurors required for conviction from being a simple majority (where there is a full complement of jurors) to a two-thirds majority.

11. It is clear that some of the key figures in the justice sector see the Bill as an opportunity for major reform to deliver improvements.

12. Lady Dorrian, the Lord Justice Clerk, chaired a review group which reported on how to improve the management of sexual offences. Many of the recommendations in her report underpin the proposals in the Bill. She told us, when discussing the proposal for a new Sexual Offences Court—

> "One of the things that we said in the report was that, if we do not seize the opportunity to create the culture change from the ground up… there is every risk

that, in 40 years, my successor and your successors will be in this room having the same conversation."

13. The Lord Advocate, the Rt. Hon Dorothy Bain □C, referred to the problems with how the justice system deals with sexual offences. She commented—

> "I experienced all those issues first hand as a prosecutor. They are issues that are not made up. They are profound problems, and they have been in existence for all the time since I became a prosecutor. Unless we change radically, we will not make any difference."

14. Angela Constance MSP, the Cabinet Secretary for Justice and Home Affairs ('the Cabinet Secretary') commented—

> "The issues that we are wrestling with here and now have been around for at least 40 years. If we do not grasp those difficult issues, we will be kicking the can for another 10, 20, 30 or 40 years, and I am not content with that."

15. On the other hand, we heard concerns, particularly from those in the legal profession, about the approach taken in the Bill of bringing forward so many significant reforms at the same time, many of which they have concerns about. For example, Stuart Murray of the Scottish Solicitors Bar Association told us that proposing to abolish the not proven verdict—

> "at the same time as all the other proposals, seems to put the criminal justice system in Scotland at risk of being adulterated, and puts access to justice and the rights of the accused—innocent until proven guilty—at substantial risk."

Approach to scrutiny

16. Our role was to consider the merits of each of these proposals in turn and on their own terms, with reference to specific wording of the Bill. This principle has underpinned the approach to our scrutiny. The Committee has also considered the cumulative impact of the proposals on the justice system.

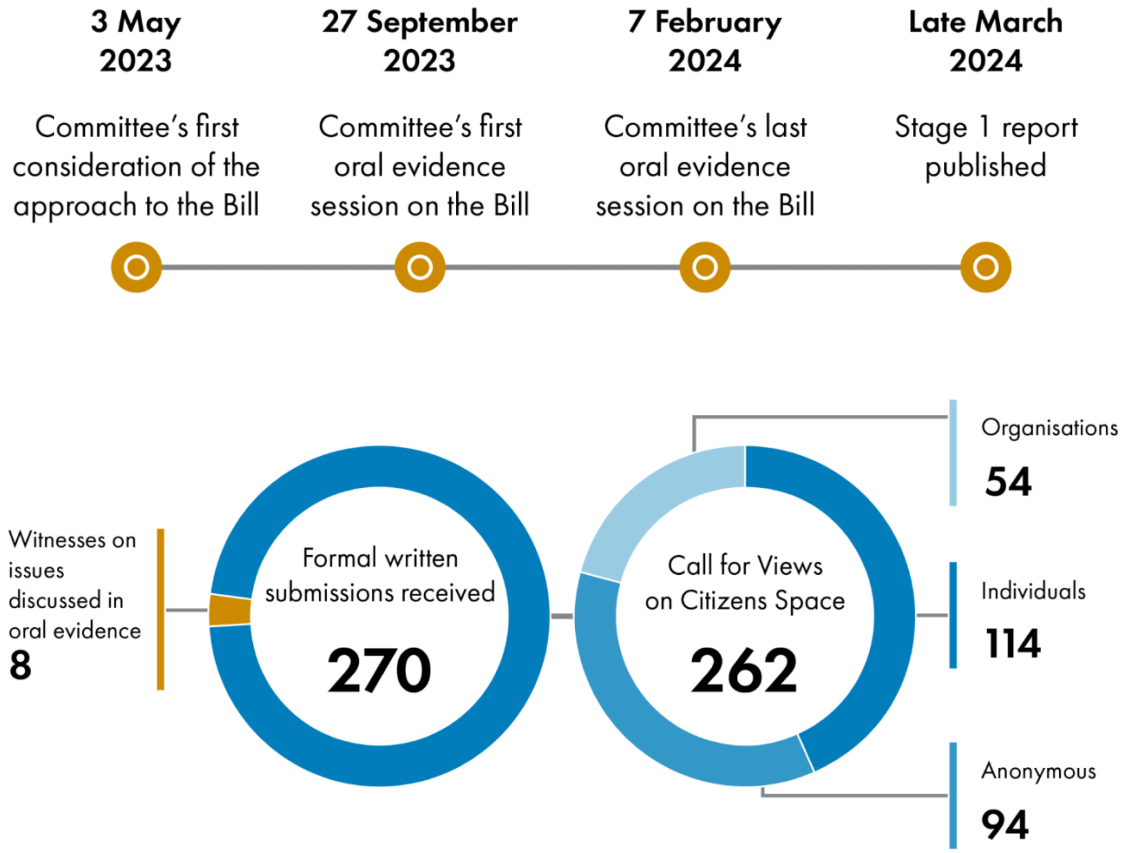
17. From the start of our scrutiny, as a Committee, we agreed it would be important to take the time to consider all the main provisions in the Bill in a thorough and balanced way.

18. We recognised that the size of the Bill necessitated a novel approach to Stage 1 scrutiny. For example, it would not be possible to ask a panel of witnesses questions about all the proposals in the Bill in a single evidence session.

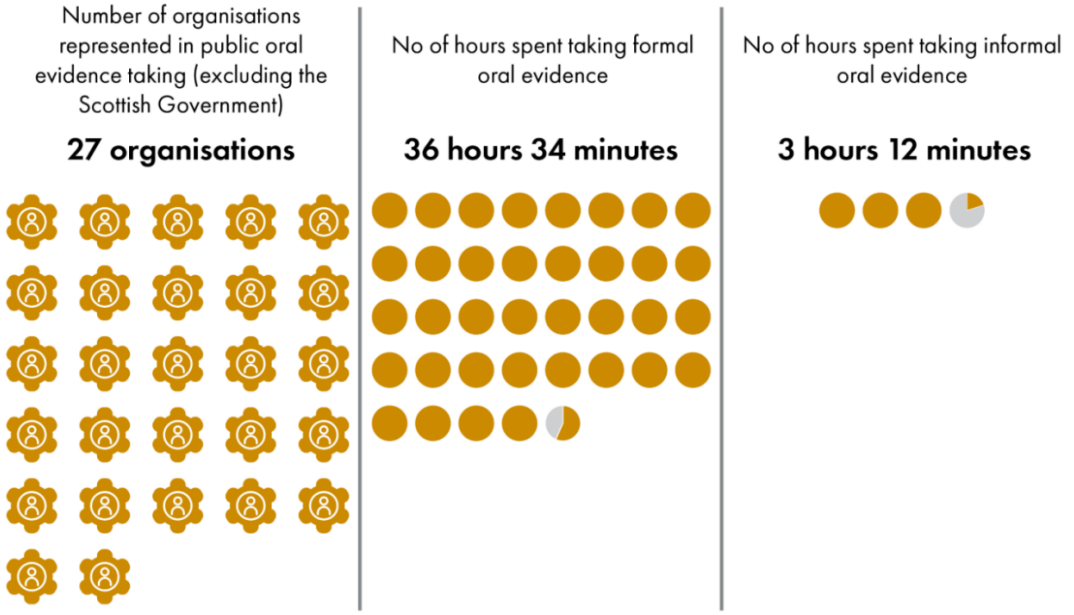
19. For this reason, we took a phased approach to our consideration of the Bill. We divided the Bill into more manageable segments for the purposes of Stage 1 and considered these separately, one after the other, in relation to the various Parts of the Bill.

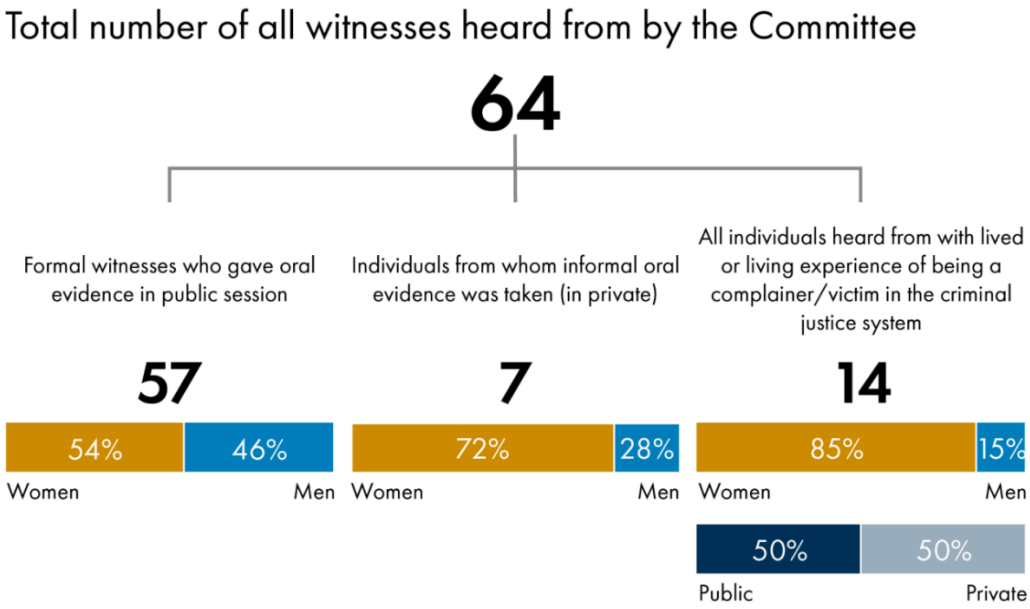
Evidence taking

20. We issued a call for written views on the Bill on 19 June 2023, which closed on 8 September 2023. We received 262 submissions, all of which can be found online.



21. In addition, we held 14 oral evidence sessions on the Bill, taking evidence from 64 witnesses.





22. Throughout this report, we directly quote from the written and oral evidence we received. Details of how to access this evidence online can be found in **Annex A.**

23. We wish to thank all those individuals and organisations who took the time to engage with us on the Bill and to provide their views.

The voice of survivors and individuals affected by crime

24. We have been determined to place the voices of survivors and individuals affected by crime at the centre of our scrutiny. We are very grateful to have the opportunity to meet individuals who have had direct experience of the justice process as survivors of crime.

25. Some of the survivors gave evidence anonymously.[1] In this report, we refer to the women who gave evidence in this way as Witness 1, Witness 2, Witness 3 and Witness 4.

26. Other survivors gave evidence in public at a committee meeting.[2] We were grateful to Sarah Ashby, Jennifer McCann, Hannah McLaughlan, Hannah Stakes, Ellie Wilson, and Anisha □aseen for taking the time to give their important evidence.

27. We were also grateful to meet, privately and informally, three individuals who had a close family member lose their life because of a serious crime of a non-sexual

[1] A transcript of the meeting can be found here: Informal Evidence Session 6 December 2023 Transcript (parliament.scot)
[2] The Official Report of the meeting can be found here: Meeting of the Parliament: □ 20CJ/17/01/2024 □ Scottish Parliament Website

nature. The individuals shared with us their experience of the justice system and their views on the proposals in the Bill.[3]

28. We are indebted to all those individuals who spoke to us and provided powerful insights into both their experience and how improvements can be made for others.

Terminology

29. We would like to comment on our use of terminology in the report when referring to individuals who have had experience of sexual offences and the criminal justice system. The formal legal term to describe these individuals is a complainer, but they can also be referred to as victims or survivors. If they are required to give evidence, they can be witnesses.

30. We use each of these terms at different point in this report depending on the particular topic being discussed and the context. No particular meaning should be inferred from this. It is also the case that different pieces of evidence (both oral evidence and written submissions) use these different terms.

31. We also provided a glossary of terms to help those responding to the Call for Views understand various legal terms used in the Call for Views, the Bill and its accompanying documents.

Finance and Public Administration Committee

32. The Finance and Public Administration Committee has a role in scrutinising the financial provisions in the Bill.

33. The Committee received a letter from the Finance and Public Administration Committee drawing our attention to the responses it received to its call for views on the Bill's Financial Memorandum.

34. We note that one of the issues raised by the Finance and Public Administration Committee has been about the proposed new Victims and Witnesses Commissioner for Scotland. We will refer to their views later in this report.

35. In addition, throughout this report, we make comment on the financial and resource implications of various proposals in the Bill.

Delegated Powers and Law Reform Committee

36. The Committee received a report from the Delegated Powers and Law Reform Committee on the delegated powers in the Bill.

37. The Delegated Powers and Law Reform Committee indicated that, in the majority of cases, it was content with the Scottish Government's proposed use of delegated powers in the Bill.

[3] A note of the meeting can be found here: Clerks Note of Informal Session on VWJR Bill 16 January 2024 (parliament.scot)

38. However, it made recommendations in two areas: the procedure of the proposed Sexual Offences Court (Part 5 of the Bill) and the pilot of judge-only trials without a jury (Part 6 of the Bill).

39. We will refer to these recommendations of the DPLR Committee in the relevant sections of our report.

Policy Memorandum

40. Under Standing Orders Rule 9.6.1, the lead committee scrutinising a Government Bill is required to consider and report on its Policy Memorandum.

41. The Committee does not have any specific points to raise on the contents of the Policy Memorandum. We will, of course, comment on the policy objectives of the Bill throughout this report.

PART 1: VICTIMS AND WITNESSES COMMISSIONER FOR SCOTLAND

Proposals in the Bill

42. The Bill proposes to create the office of a Victims and Witnesses Commissioner for Scotland.

43. The Commissioner would be independent of the Scottish Government and criminal justice agencies. The Commissioner would be accountable to the Scottish Parliament, with ongoing funding provided by the Parliament. Initial funding would be provided by the Scottish Government with recurring annual funding then being provided by the Scottish Parliamentary Corporate Body.

44. In general terms, the purpose of the Commissioner would be to promote and support the rights and interests of victims and witnesses. In order to achieve this, the Commissioner would be required to carry out a range of activities. These would include: engagement with victims, witnesses and victim support services monitoring compliance with statutory duties promoting best practice producing research and making recommendations.

45. One of the roles of the Commissioner would be to monitor compliance with the Standards of Service for victims and witnesses and promote trauma-informed approaches.

46. The Commissioner would be able to conduct investigation into whether the Scottish Government and other criminal justice agencies have had regard to the interests of victims and witnesses in carrying out their functions. This power would be subject to a restriction preventing the Commissioner from directly intervening in individual cases.

47. The Policy Memorandum described the Scottish Government's view as to the benefits of a victims commissioner as follows—

> "The Commissioner will provide an independent voice for victims and witnesses, champion their views and encourage policy makers and criminal justice agencies to put victims' rights at the heart of the justice system. The role will benefit victims and witnesses of crime by providing an additional, statutory mechanism for their voices and experiences to be heard. It will also help raise awareness and monitoring of the rights of victims and witnesses."

Overall views on the creation of a Victims and Witnesses Commissioner for Scotland

48. The Committee will firstly discuss the views we heard on the merits, in general terms, of creating a Victims and Witnesses Commissioner for Scotland.

49. We will then discuss some of the views we heard on the specific details of the post, as set out in the Bill, as well as issues around funding of the role.

50. Please note that, in the interests of brevity, we will normally refer to the Victims and Witnesses Commissioner for Scotland as the "Victims Commissioner" or just "the Commissioner".

Views of the victims of crime

51. The Committee took evidence from organisations representing the victims of crime.

52. Victim Support Scotland supported the creation of a victims commissioner.

53. □ate Wallace of Victim Support Scotland noted that the proposal was "overwhelmingly" supported by victims themselves. She commented—

> "They wanted the establishment of a figurehead who would champion their rights and hold criminal justice agencies to account."

54. She pointed out that, with only one exception, every member of Victim Support Scotland's reference groups, which allow people with lived experience to have their voices heard about the justice system, had expressed an interest in engaging directly with a victims commissioner.

55. □ate Wallace highlighted that a commissioner could hold organisations in the justice sector to account for their Standards of Service for victims and witnesses. Her view was that this was not happening at present.

56. She also argued that a commissioner could ensure that complaints processes are clear, transparent and easily understood by people who need to use them.

57. Sandy Brindley of Rape Crisis Scotland told us her organisation was initially sceptical of the need for a commissioner and of the benefits, given that they cannot intervene in relation to individual cases. However, the position of Rape Crisis Scotland had changed to an extent due to feedback from victims that they would value the creation of the post.

58. Sandy Brindley told us she had consulted sexual offence complainers who had an "ambivalence" about the creation of the post. Sandy Brindley herself expressed concerns about managing the expectation of victims that the Commissioner will be able to assist with their individual cases, when the Bill does not provide for this.

59. Scottish Women's Aid was not supportive of the creation of a victims commissioner.

60. Dr Marsha Scott of Scottish Women's Aid expressed concern that the Commissioner might not necessarily have a good understanding of issues relating to violence against women and girls.

61. She commented that there was a risk that the criminal justice system might not change in response to the work of the Commissioner, and she would "be very unhappy if anybody thought that they had solved the problem of accountability by creating a commissioner".

62. Dr Scott also noted that her colleagues in women's aid organisations across the U considered that Scotland was unique in the U in allowing victim support organisations good access to Ministers and other politicians. Their view was that—

> "…creating an institution that would stand between us and them was a retrograde step that would interfere with that."

63. ate Wallace of Victim Support Scotland did not share this perspective and argued that a victims commissioner "could have a seat at the tables that we are not currently at", including the Criminal Justice Board. She commented—

> "I do not see the victims commissioner's role as taking anything away from voices in the way that, perhaps, some others are concerned about."

64. We also heard directly from individuals with lived experience of crime.

65. Lynn Burns, a member of both the Scottish Government's Victims Taskforce and the Parliament's Cross Party Group for Adult Survivors of Childhood Sexual Abuse, wrote to us. She is also the Vice Chair of Break the Silence, an Ayrshire-based charity supporting survivors of childhood sexual abuse and rape. She also explained that her son had been murdered in October 2013.

66. In her letter, Ms Burns told us—

> "I participate in a number of victims reference groups with these organisations and through Victim Support Scotland, and I speak regularly with victims and survivors of many different types of crime and violent crime on a regular basis, and I can confirm that there is a strong appetite for a Victims and Witnesses Commissioner for Scotland.
>
> The Victims Commissioner role is entirely different from roles currently in place and is a consistent conduit. An official position which will enable participation and involvement with certain committees and boards where third sector organisations are not admitted. A position which unites and represents all victims of crime, rather than individual agencies."

67. We also heard from women who are survivors of sexual crimes and have personal experience of the criminal justice system.

68. Three of the four witnesses who gave evidence at the Committee's informal meeting on 6 December 2023 supported the creation of a victims commissioner. The other witness was not familiar with the proposal. One of the witnesses told us "it's crazy that we don't already have one".

69. At the Committee's meeting on 17 January 2023, Sarah Ashby told us that she supported creation of a commissioner, stating—

> "I am very much behind the idea of the commissioner role—in my eyes, that should be the person who puts in place the rules for consistency and continuously checks on the way that advocates perform in all courts."

Other views

70. We heard a number of other views on the merits of the creation of a victims commissioner.

71. Dr Louise Hill of Children 1st explained that her organisation had a "balanced point of view" on the proposal. She said she was positive about the opportunity of a commissioner but "we would want a role such as that to make a difference for children". A priority for Children 1st would be for a new commissioner to scrutinise the lack of implementation of current criminal justice legislation relating to children.

72. Representatives from Inclusion Scotland and the Scottish Refugee Council both told us that they had not consulted their membership on the question of a new commissioner, but indicated that, in their view, they would be likely to be supportive of the proposal.

73. Bill Scott of Inclusion Scotland commented that a victims commissioner could make a difference, but it depended on whether they would be willing to "take up the cudgels on behalf of victims and witnesses". He noted that one potential subject for a commissioner to consider is what action certain justice agencies are taking to identify whether a victim or witness is a vulnerable person.

74. A similar point was made by Graham O'Neill of the Scottish Refugee Council, who told us—

> "…if the victims and witnesses commissioner were to take up the cudgels of exercising scrutiny, as Bill Scott described, and then had the teeth or a mechanism for enforcement to ensure compliance by the responsible criminal justice bodies, we would be supportive of that."

75. The Committee also heard the views of representatives of the legal profession.

76. Jamie Foulis of the Family Law Association indicated that his organisation was broadly supportive of the creation of a commissioner, however, in his view, it remained to be seen how the new role will operate in respect of civil justice.

77. Jonathan Campbell of the Edinburgh Bar Association indicated that his association supported the appointment of a commissioner. However, he noted that there were concerns about the functions of the Commissioner in the Bill being "ill-defined and extremely broad", though he acknowledged they may be refined in time.

78. He conceded that "without a clearer definition of the role, it is difficult for me to comment on how specifically it would operate and work".

79. Jonathan Campbell also expressed concern about the use of the term 'victim' in the Commissioner's title, rather than the term complainer.

80. This was also a point made by the Faculty of Advocates in its written submission—

> "Faculty considers that in legal contexts, such as legislation, 'complainer' is the appropriate term to be used. Faculty considers that Parliament ought to give great consideration as to whether it wishes to designate an individual as a 'victim' prior to a conviction, and potentially despite a verdict of acquittal."

81. Stuart Munro from the Law Society of Scotland indicated support for the principle of creating a commissioner and commented that it would be of benefit to have an individual championing the interests of witnesses and complainers.

Position of the Scottish Government

82. In evidence to the Committee, the Cabinet Secretary, argued that "there is long-standing and clear demand for the role from victims". She noted that public consultation has revealed that there is strong support for the role.

83. The Cabinet Secretary explained that—

> "…the bill is about the need for an independent voice and a champion who will challenge criminal justice agencies... the role also brings an additional statutory mechanism that enables voices and experiences to be heard. A key role of the commissioner will be to monitor compliance with the victims code and the standards of service, including the requirement for agencies to actively demonstrate trauma-informed practice, and, in that manner, to monitor how the rights of victims and witnesses are being respected."

84. In relation to the potential duplication of the Commissioner's role with that of other organisations supporting victims of crime, the Cabinet Secretary told us—

> "Those are distinct roles, which complement each other… To be honest, in my experience as a minister, dealings with commissioners are always quite formal—a few times a year, at arm's length, and with an exchange of correspondence—but engagement with stakeholders and front-line organisations is always more intense and more frequent."

Resources

85. One significant theme which emerged during our evidence-taking on the proposal for a victims commissioner was the cost of the funding the post, and what the implication would be of that expenditure on other support for victims.

Impact on the Scottish Government and the Scottish Parliamentary Corporate Body

86. The Financial Memorandum accompanying the Bill explains that one-off costs of up to £638,719 will be provided by the Scottish Government for the set-up of the Commissioner's office and running costs for the first year of its operation.

87. Thereafter, recurring funding of up to £615,149 annually will be met by the Scottish Parliamentary Corporate Body (SPCB).

88. The Financial Memorandum contains further details of the breakdown of this anticipated expenditure. In relation to anticipated staffing levels, it states—

> "The Commissioner will be supported by four members of staff, with recruitment anticipated to take place in year 2. In addition to remuneration for the Commissioner (of up to £126,119 as set out in Table 1), it is anticipated that staffing will comprise an office manager, two policy officers / researchers and admin support, at a total estimated recurring cost of £217,000. This staffing complement is based on the arrangements for existing Parliamentary Commissioners' offices, and consideration of the Victims and Witnesses Commissioner's key duties."

89. A written submission from the Children and Young People's Commissioner Scotland suggested that the funding set out in the Financial Memorandum might not be sufficient for the Victims Commissioner to carry out their full responsibilities—

> "The VW Commissioner is also proposed to have a wide range of powers, but little resource with which to deploy them. This may be a recognition of the limitations on the VW Commissioner's role caused by these overlapping remits and functions. However, even on a more limited reading of the Bill, we do not expect that the VW Commissioner would in a position to exercise all of these powers without being granted substantial additional resource (both financial and staffing)."

90. The Convener of the Scottish Parliament's Finance and Public Administration Committee wrote to us about the financial impact of the establishment of commissioner roles on the SPCB—

> "The Committee has previously expressed concerns regarding the increasing number of commissioners during our evidence session with the Scottish Parliamentary Corporate Body (SPCB) as part of our scrutiny of the Scottish Budget 2023-24."
>
> "In the coming months, the Committee will undertake further work on the evolution of the overall landscape of commissioners since devolution, with the aim of proposing a more strategic approach to establishing and financing Commissioners. We will also continue to scrutinise the FMs associated with any future officeholder legislation and to draw concerns to the attention of the relevant lead committee where appropriate.
>
> In the case of the Victims, Witnesses, and Justice Reform (Scotland) Bill, we invite you to explore with the Scottish Government the concerns raised regarding the financial impact of establishing this Commissioner on the SPCB's officeholder responsibilities."[4]

91. As referenced above, the Finance and Public Administration Committee has begun an inquiry into "Scotland's Commissioner landscape", the remit of which is—

[4] Letter from the Convener to the Convener of the Criminal Justice Committee of 2 November 2023 (parliament.scot)

- To foster greater understanding of how the Commissioner landscape in Scotland has evolved since devolution

- To enhance clarity around the role, and different types, of Commissioners and their relationships with government and parliament

- To establish the extent to which a more coherent and strategic approach to the creation and development of Commissioners in Scotland is needed and how this might be achieved

- To provide greater transparency to how the governance, accountability, budget-setting, and scrutiny arrangements work in practice, and whether any improvements are required, and

- To identify where any lessons might be learned from international Commissioner models.

92. The Finance and Public Administration Committee does not intent to make recommendations on the merits or otherwise of individual Commissioners currently supported by the SPCB. It is expected that the inquiry will report in May / June 2024.

Impact on front line services

93. When we took evidence on the creation of a victims commissioner, many organisations which support victims were keen to establish that the funding of the Commissioner would not divert resources from front-line services.

94. Sandy Brindley of Rape Crisis Scotland explained that her organisation expects to lose 28 rape crisis workers from March 2024. She commented that—

> "…it makes it quite difficult for us to support whole-heartedly the creation of a victims commissioner when front-line services are being decimated. We need to think about the proposal in the context of the financial position, what the priorities should be and what is most important for victims and survivors."

95. It was not clear to Victim Support Scotland and Rape Crisis Scotland whether the proposed funding for the Victims Commissioner will come from existing budgets for victim support services or will represent additional funding.

96. □ate Wallace of Victim Support Scotland told us—

> "…we have always said that we are supportive of a victims commissioner's position as long as the finances for it do not take anything away from front-line services. We need clarity on that point first off. So far, I have not heard anything about where the budget for it has been identified."

Alternative uses of resources

97. A related question which the Committee explored with witnesses was whether, if resources were limited, it might be preferable to spend the money on alternative measures to support victims rather than a victims commissioner. We note that this could be referred to as the 'opportunity cost' of establishing a commissioner (that is,

that the costs of the commissioner are not available to be used for other victims-related purposes).

98. Sandy Brindley of Rape Crisis Scotland argued that the most effective way to make victims' rights meaningful and to hold bodies to account is to provide access to legal advice, particularly for sexual offence complainers. She commented "I think that that is what victims are looking for, rather than a figurehead" and she went on to say—

> "if a lack of resources meant that I had to choose between providing legal advice to sexual offence complainers or creating a victims commissioner, I would absolutely choose legal advice. That is the only way to make rights real."

99. A Committee member put to Louise Hill of Children 1st a hypothetical scenario in which a single pot of money could either be allocated to a Bairns' Hoose or a victims commissioner. She replied—

> "I think that, fairly, given our position at Children 1st and from listening to children, our decision would be that we would put that money into a bairns' hoose."

100. Written evidence from the Manda Centre commented that there are limited resources within the criminal justice system in Scotland. The submission argued that the appointment of a victims commissioner would adversely impact resources and that the funding would be better directed at providing additional support services to victims and victims' services.

101. Stuart Munro of the Law Society of Scotland noted that there are a number of ideas for how to improve victims' experience of the criminal justice system which do not require a victims commissioner, but if those improvements are not otherwise going to be made, "it might be that a commissioner is the best person to try to jockey that change along".

Position of the Scottish Government

102. The Committee asked the Cabinet Secretary about the costs associated with the establishment of a victims commissioner. She commented that there may be opportunities for cost savings to be made, stating—

> "We are all operating in a fiscal reality, of course, but there are provisions in the bill that enable the victims and witnesses commissioner to share back-office functions. A number of commissioners already do that.
>
> The bill does not disqualify an existing commissioner from being appointed to the new role. Any commissioner would need to comply with the Scottish Parliamentary Corporate Body around things such as the office location. Many commissioners are located in shared premises in Bridgeside house in Leith, in the existing Scottish Government estate, or in the existing public sector estate."

103. The Committee also asked the Cabinet Secretary about the concerns expressed that funding for the Victims Commissioner might impact on spending on front-line services. She commented—

> "It is a completely different function from the role and purpose of the front-line services… investment in a victims and witnesses commissioner should not be taken from front-line services. Of course, we operate within a fiscal envelope. I understand and am respectful of the fact that people have a duty to test the costs and the detail in financial memorandums for any new proposal."

Individual cases

104. We heard a number of comments on the proposal in the Bill that the Victims Commissioner should be prevented from intervening in individual cases.

105. Section 8 of the Bill states—

> "8(1) The Commissioner may not exercise any function in relation to an individual case.
>
> 8(2) But subsection (1) does not prevent the Commissioner considering individual cases and drawing conclusions about them for the purpose of, or in the context of, exercising a function."

106. The Policy Memorandum explains that section 8 of the Bill places restrictions on the exercise of the Commissioners' functions, notably that they will not champion or intervene in individual cases. One of the reasons given is that this will "enable the Commissioner the independence and resources to focus on identifying common issues and influencing systems-level change".

107. The position of the Scottish Government is that criminal justice agencies already have well-established complaints procedures which they are required to set out in their standards of service for victims and witnesses, and there are additional steps that can be taken if someone does not feel their complaint has been dealt with satisfactorily.

108. The Policy Memorandum makes the point that—

> "This approach does not preclude the Commissioner from considering individual cases in order to understand the national picture, and reflects what can be seen in other jurisdictions, where commissioners do not provide direct support to victims (though they can signpost or refer to services), offer legal advice, influence or interfere in criminal investigations or proceedings, or become involved in decisions around compensation for victims."

Views on the Commissioner intervening in individual cases

109. The Committee heard different views on whether the Bill takes the right approach to the Commissioner's involvement in individual cases.

110. Ann Marie Cocozza of Families and Friends Affected by Murder and Suicide (FAMS) told us—

> "For me, the fact that the commissioner will not be allowed to review individual cases means that the role loses its teeth…"

111. Ann Marie Cocozza noted that there was "100 per cent" support amongst FAMS lived experience support groups for there to be a commissioner, and "there was an appetite to contact the commissioner on individual cases in order to prevent any other family from having to go through what they feel that they have gone through".

112. Some witnesses mentioned that the Children and □oung People's Commissioner Scotland (sometimes abbreviated to "the Children's Commissioner") had powers, in certain circumstances, to investigate individual cases.

113. The Children and □oung People (Scotland) Act 2014 gave the Children's Commissioner new powers to conduct an individual investigation without an issue of wider principle to be raised. However, the Children's Commissioner would still be unable to investigate a reserved issue or duplicate the investigatory functions of another organisation.

114. □ate Wallace of Victim Support Scotland felt these powers should be mirrored for the Victims Commissioner.

115. A written submission from Action for Children Scotland made a similar point—

> "The CYSPS can also investigate cases affecting the human rights of an individual child or young person. While noting that the proposed Victims and Witnesses Commissioner can conduct investigations, we question why the proposed Commissioner would be prevented from acting in relation to individual cases."

116. A written submission from the office of the Children's Commissioner noted that the section of the Bill dealing with the Victims Commissioner and individual cases was "confusingly worded and unclear as to its practical effect in relation to individual cases". The submission argued that "this risks causing considerable confusion and raising expectations for individuals which the VW Commissioner will have to manage extremely sensitively".

117. Some organisations were satisfied with the proposed restrictions in the Bill on the Commissioner becoming involved in individual cases.

118. A written submission from Police Scotland stated that it is preferable that the Commissioner is not in a position to intervene in individual cases on the basis that this is likely to result in circumstances where investigations are prejudiced as a result of information sharing with the Commissioner.

119. The Law Society of Scotland was concerned that if the Commissioner became involved in individual cases this could adversely impact on the trial process. In addition, Stuart Munro of the Law Society of Scotland raised some practical concerns—

> "Given the sheer volume of cases that go before the courts, how could their time be split effectively to allow meaningful engagement in individual cases, what

might that mean for apparent imbalances in treatment, and to what extent could it impact upon the criminal justice process as a whole?"

Position of the Scottish Government

120. The Cabinet Secretary was asked about the provisions in the Bill on the Commissioner intervening in individual cases. She commented—

> "…we have carefully looked at that, bearing in mind the operational independence of our courts and prosecutors, and that it is not in anybody's interest for those processes to be interfered with. Ultimately, the victims and witnesses commissioner is about amplifying the voices of victims and witnesses to ensure better and consistent system-level change."

121. She explained that a commissioner could engage with individuals and can consider the individual experiences of people, in order to improve understanding of the national picture. She also commented—

> "Bearing in mind the discussions that we have had so far about concerns about duplication and costs, I am satisfied that the commissioner, as is the case with other commissioners, will not take on or intervene in individual cases."

122. In a subsequent letter to us, the Cabinet Secretary clarified that the Children's Commissioner can investigate individual cases but only where certain conditions are met (as we have discussed above). However, she reiterated that—

> "I remain content that the powers set out within Part 1 of the Bill will be sufficient for the Victims & Witnesses Commissioner to fulfil their role effectively."[5]

Relationship with other bodies and individuals

123. The Committee received views on the relationship which the proposed Victims Commissioner might have to other bodies and individuals within the criminal justice sector.

Children's Commissioner

124. In a written submission, the Criminal Justice Voluntary Sector Forum raised concerns about the potential overlap between the remits of the Victims Commissioner and other commissioners, which could create confusion. The submission suggested—

> "There is perhaps a need for clarity and distinction in these roles and responsibilities, and the need to establish a clear process for collaborative working, to ensure that no one is batted from 'pillar to post'."

[5] VWJR Bill 15 November Meeting Follow Up Evidence (parliament.scot)

125. A specific point was brought to our attention about the potential lack of clarity in respect of the responsibilities of the Victims Commissioner and the Children Commissioner.

126. Louise Hill of Children 1st told us—

> "We would not want child victims to fall between two stools, because that can happen when there are different roles. They are children and they are also victims. There would need to be real clarity about what the victims commissioner would cover."

127. Some of these issues were also discussed in a written submission from the Children's Commissioner's office. The submission noted that it had previously highlighted to the Scottish Government the potential significant overlap between the Victim's Commissioner's functions and its office, however—

> "The Bill itself does not answer many of the concerns we expressed and we note that no Children's Rights Impact Assessment (CRIA) has been conducted… This includes the impact of proposals which appear to duplicate or overlap functions of the Commissioner. This lack of detail in the Bill and its accompanying documents, makes it hard to express clear and concluded views on a number of aspects of the Bill."

128. The submission gives an example of potential overlaps in function. The Bill provides that Victims Commissioner would have the general function to promote and support the rights and interests of victims and witnesses. However, the Children's Commissioner has the general function to promote and safeguard the rights of all children up to 18 and care experienced young people up to 21. The submission comments—

> "We are not clear what distinction (if any) is intended by use of the word "support" rather than "safeguard", but where victims and witnesses are children and young people, the VW Commissioner's general function will clearly overlap with the general function of the Commissioner."

129. We asked the Cabinet Secretary for her views on the concerns raised by the Children's Commissioner's office. She commented—

> "We have been working to ensure that the connectivity and links between the Children and Young People's Commissioner Scotland and the victims and witnesses commissioner are appropriate and that there is no duplication. For example, section 10 of the bill gives the commissioner powers to carry out an investigation, but not to duplicate the functions of others.

130. The Cabinet Secretary went on to say—

> "The bill is crafted to ensure that we have clarity instead of confusion and that the victims and witnesses commissioner cannot go into the functions and duties of another commissioner or, indeed, another body. However, section 6 empowers the victims and witnesses commissioner to engage with the Children and □oung People's Commissioner Scotland."

British Transport Police

131. British Transport Police raised a specific point with us in a written submission. It noted that it was not included as an organisation which would be legally subject to any monitoring or engagement by the Victims Commissioner.

132. The submission commented that the British Transport Police should have parity with Police Scotland in the Bill, otherwise there would be differences in how victims and witnesses were treated, based on whether they were within a Police Scotland or British Transport Police jurisdiction.

133. We put this point to the Cabinet Secretary who noted that the agencies listed in the Bill are those listed in the Victims and Witnesses (Scotland) Act 2014. She also pointed out that the British Transport Police operates in other parts of the U as well as Scotland, and the Bill could only apply to their operations in Scotland. However, she commented that "our door is open if there is more that we can do to work with the BTP and to work in partnership".

Parole Board for Scotland

134. The Parole Board for Scotland queried as to whether it should be classified as a criminal justice agency for the purposes of engaging with the Victims Commissioner.

135. The written submission from the Parole Board for Scotland stated—

> "The Board does not consider that it is a Criminal Justice Agency nor should it be designated as such. It is a judicial body and has nothing in common with the individuals or bodies listed in Clause 23. It does consider that it should be part of the Victim and Witnesses Commissioner's ambit but in this it should be grouped with the criminal and civil courts."

136. We raised this concern with the Cabinet Secretary who commented that—

> "The Parole Board is a legal entity and has an interface with victims and witnesses. Therefore, like other criminal justice agencies, it will have to demonstrate its compliance with trauma-informed practice as per the provisions in the bill."

Independence of the Lord Advocate

137. In a written submission to the Committee, the Crown Office and Procurator Fiscal Service raised concerns about section 16 and 17 of the Bill. These provisions would give the Victims Commissioner the power to require a "reasoned response" from the Lord Advocate to matters within the Commissioner's annual report.

138. The written submission stated from the Crown Office stated that these provisions—

> "…may unintentionally impact on the Lord Advocate's retained functions as head of the systems of criminal prosecution and investigation of deaths in Scotland, including functions in relation to the training of prosecutors, the content of the standards of service that are set by the Lord Advocate and prosecution policy."

139. When we subsequently took evidence from Laura Buchan of the Crown Office and Procurator Fiscal Service, we asked for clarification on these concerns. She provided reassurance that the Crown Office does not consider that the Bill is incompatible with the Lord Advocate's independence, but that the Crown Office was in discussions with the Scottish Government—

> "…to ensure that that clarity is there for all about the Lord Advocate's independence and her role in prosecutorial decisions and other areas of policy and guidance."

140. The Cabinet Secretary addressed this point when she gave evidence to the Committee—

> "With regard to the Lord Advocate's powers, I am clear that there is nothing in the bill that in any way interferes with or disrupts the Lord Advocate's constitutional powers with respect to prosecution decisions or her other functions. The bill simply acknowledges the role of the Crown Office and the fact that it has functions that have an impact on the treatment of victims. In my view, a victims and witnesses commissioner should be able to make recommendations, but only in respect of the Lord Advocate's functions in relation to the treatment of victims, not in relation to those powers that only the Lord Advocate has the constitutional authority to undertake."

141. The Committee asked the Lord Advocate for an update on the concerns when she gave evidence. The Lord Advocate provided reassurance that—

> "The process of sharing the written submissions to the committee, the exploration of the issues that are before the committee and further work with Scottish Government officials have resolved any of the issues that were of concern previously."

142. As a result, the Lord Advocate told us that she did not consider any amendments were required to the Bill in this area. We raised with the Lord Advocate the question as to whether the understanding which has been reached with the Scottish Government should be formalised in some way and she indicated this would be considered.

143. In subsequent correspondence with the Committee, Laura Buchan of the COPFS explained that COPFS officials have met with the relevant Scottish Government officials to explore the possibilities for a formalisation of the role of the Commissioner in relation to the independence of the Lord Advocate. The letter noted that—

> "As the Commissioner would be independent of both the Scottish Government and the Parliament it was determined that it would be appropriate for any such formalisation to be undertaken between the Commissioner and the Lord Advocate directly.
>
> It has been identified that the existing Bill provisions at sections 6 and 7 would enable the Lord Advocate and the Commissioner to agree the terms under which the Commissioner exercises their functions relative to the Lord Advocate's

> independence and it is considered that these provisions would provide the opportunity for the required formalisation to be achieved."

144. We do not consider that the above correspondence provides a proper explanation of the nature of the agreement which has been reached with the Scottish Government and we make a recommendation on this point later in this report (see paragraph 168).

Power to request information

145. A final theme which emerged in evidence was about the Victims Commissioner's power under the Bill to request information.

146. Section 12(1) of the Bill states that "the Commissioner may require any person to give evidence on any matter within the terms of reference of an investigation". This section also states that "the Commissioner may require any person to produce documents in the custody or control of that person which have a bearing on any such matter".

147. Jonathan Campbell of the Edinburgh Bar Association commented that there is a lack of clarity in the Bill about what the potential penalties would be for failure to comply with these requirements. He commented that "for the proposed role to have full effect, that needs to be clearly defined, in the way that it is in the context of other professional bodies making requests of defence solicitors".

148. Jamie Foulis of the Family Law Association suggested that it would be helpful if there was clarity on the timescales within which it is expected that information would be provided to the Commissioner.

149. Stuart Munro of the Law Society of Scotland drew comparisons with the Scotland Act 1998 which contains requirements for committees of the Scottish Parliament to require the production of information which also contain penalties for non-compliance. He suggested that "there might be sense in having a broadly comparable provision in the bill that would effectively create a penalty for failure to comply", even if it might not need to be used.

150. The Committee received a written submission from Police Scotland which raised another point about the proposed powers in section 12 of the Bill.

151. The submission from Police Scotland noted that it is not clear what "matters" are being referred to and commented that—

> "…this is potentially problematic where the documents sought may prejudice an ongoing or future investigation or may result in the disclosure of sensitive or confidential information, intelligence, or investigative tactics employed by police officers. This could also raise issues of data protection where evidence is sought in respect of specific details of specific cases."

152. Police Scotland suggested that there should be an additional requirement in the Bill that any evidence or documentation produced in the course of an investigation should not be used for any purposes other than in respect of the investigation for which it was produced.

153. The Committee raised with the Cabinet Secretary the point about the apparent lack of provisions in the Bill to enforce the Commissioner's powers to request documents. She responded that if non-compliance occurred, this is something which Parliament could pursue, stating—

> "I may well stand to be corrected but, by and large, commissioners are accountable to Parliament, so if they are reporting on significant abdication of duty or non-compliance with legislation or standards of service, that information is made available to Parliament, and it is for parliamentarians to consider what further action would be appropriate."

Conclusions and recommendations

154. We have considered carefully the proposal in the Bill to establish a Victims and Witnesses Commissioner for Scotland.

155. Many individuals and organisations supported the proposal, however we noted that their degree of enthusiasm varied. Victim Support Scotland was very supportive. Rape Crisis Scotland was initially somewhat more ambivalent. Scottish Women's Aid was not in favour of the creation of the post, citing concerns that this could interfere with their ability to engage directly with the Scottish Government and other criminal justice bodies.

156. Many survivors of crime we heard from were supportive of the establishment of the post. However, we heard that some survivors might have an expectation that the Commissioner would be able to become involved in their individual cases.

157. We have heard views on the potential benefits to establishing the Commissioner post. The Commissioner would have a role in championing the voice of victims and witnesses, highlighting areas of concern to policy-makers, and promoting good practice. The Commissioner would also have the responsibility of monitoring agencies' compliance with their statutory obligations in relation to trauma-informed practice, which is an important provision in this Bill.

158. However, there is a wider context which we must reflect on when we consider the merits of establishing the post.

159. First, the Commissioner would be a new voice which would be required to fit into the existing landscape of organisations which already advocate for victims' rights and interests, with considerable effectiveness. Some have argued that this new voice would bring a fresh focus and impetus. However, another view, which we are concerned about, is that the post could create another layer of

bureaucracy and stand in the way of victims and advocacy groups engaging directly with policy-makers.

160. Second, the proposal in the Bill would result in the creation of another commissioner, at a time when public finances are under pressure and there are already eight commissioners funded by the Scottish Parliamentary Corporate Body with a further three commissioners being proposed by current members bills.

161. We note that the Finance and Public Administration Committee is currently conducting an inquiry into role of commissioners. This will, among other things, consider whether a more coherent and strategic approach is needed to commissioners in Scotland. However, it will not make recommendations on the merits of individual commissioners. The report of the inquiry is due in May or June 2024, at which time this Bill is still likely to be continuing its parliamentary scrutiny. We raise the possibility that there may be a need to amend the proposals for the Victims and Witnesses Commissioner depending on the outcome of that report.

162. Third, we must also consider whether there would be an 'opportunity cost', associated with the establishment of a Victims and Witnesses Commissioner. By that we mean that the costs of funding the Commissioner post would not be available to be used for other purposes to support victims and witnesses. On this question, it is not clear yet whether the funding for the post would be additional to, or taken from, existing justice budgets that fund victim support or for other purposes.

163. We note that some organisations preferred that funding is allocated to directly support specific initiatives to improve the experience of victims and witnesses rather than funding a Commissioner, where the benefits are perhaps less immediate. For example, Rape Crisis Scotland told us that, if given a hypothetical choice, they would fund legal representation for complainers rather than establish a Commissioner.

164. In light of these considerations, we remain to be convinced that a strong case has been made for the establishment of a Victims and Witnesses Commissioner. Instead, we consider that better outcomes may be achieved by focusing spending in areas which have a more direct and immediate benefit for victims and witnesses. We invite the Scottish Government to consider if they still wish to proceed.

165. If, having considered the points we raised, a Commissioner post is to be established, then we recommend that in the first instance it should be for a time-limited period in order to allow for an assessment to be made of the value of the role. We recommend that any extension to this initial period should only take place after an independent review had been conducted into the operation of the post and following a further decision of Parliament. We expect that Parliament would want to see clear evidence that the post of Commissioner has noticeably improved the experience of victims and witnesses. We recommend that the initial time-limited period for the post should be a single

term of office in order to allow sufficient opportunity for the effectiveness, or otherwise, of the new post to be demonstrated.

166. Turning now to some of the specific details of the proposal for a Commissioner in the Bill, we note the Commissioner would not be able to provide support or advice in relation to individual cases although this does not prevent the Commissioner considering individual cases and drawing conclusions about them. Some Members would wish the Commissioner to have a stronger role in respect to investigatory powers.

167. We noted the specific concerns which have been raised with us by the Children's Commissioner about the potential overlap between its remit and the role of the Victims and Witnesses Commissioner. We invite the Scottish Government to respond to these concerns and consider whether the Bill could be clearer in this regard. We also invite the Scottish Government to address the point raised by the British Transport Police that it would not be legally subject to any monitoring or engagement by the Commissioner. We believe that this raises wider issues about the interface and role of the various commissioners which may be covered by the forthcoming report of the Finance and Public Administration Committee.

168. On the power given in the Bill for the Commissioner to require persons to give evidence and produce documents, we note that the Bill does not contain any powers to enforce these provisions. The Cabinet Secretary observed that this is something which Parliament would be able to pursue and consider what further action would be appropriate. We ask the Scottish Government for clarity on how this would work in practice, and ask whether there is a need for enforcement power to be included on the face of the Bill.

169. Lastly, we noted the suggestion in the written submission from the Crown Office and Procurator Fiscal Service (COPFS) that the power in the Bill to require a 'reasoned response' from the Lord Advocate to matters within the Commissioner's annual report might affect the Lord Advocate's legal responsibilities. We note that the Lord Advocate has now been reassured on this point (see paragraph 141) and considers that no amendments are required to the Bill. We welcome this, but believe it is necessary for the understanding reached between the COPFS and the Scottish Government to be formalised in a memorandum of understanding and for this to be publicly available.

PART 2: TRAUMA-INFORMED PRACTICE

Proposals in the Bill

170. A stated objective of the Bill is to reduce trauma for victims and witnesses in the justice system. The Policy Memorandum states that—

> "The Bill responds to calls for justice process and practice to be more trauma informed. It recognises the importance of treating people who are involved in court proceedings more compassionately and in ways that recognise the impact of trauma and seek to reduce the risk of retraumatisation."[6]

171. In this section of the report, the Committee will focus on the provisions in Part 2 of the Bill on trauma-informed practice. Our focus will be on what the specific provisions in Part 2 of the Bill state and what impact they are likely to have.

172. Elsewhere in this report we discuss other proposals in the Bill which aim to reduce trauma, such as the proposed new sexual offences court. We will also highlight measures which do not require legislation to implement.

173. In summary, the question of how to reduce trauma in the justice system is a central issue which runs throughout this report rather than being restricted to our discussion of any one set of provisions.

Position of the Scottish Government

174. The Scottish Government's view is that it is crucial that each part of the justice system consider their operational processes and procedures from a trauma-informed perspective.[7]

175. The Policy Memorandum states that—

> "The Bill aims to embed trauma-informed practice across the justice system, providing a legislative underpinning for both necessary cultural and procedural change."

176. Part 2 of the Bill contains proposals to provide this legislative underpinning.

Justice agencies and trauma-informed practice

177. The Bill proposes to amend the Victims and Witnesses (Scotland) Act 2014 ("the 2014 Act") in relation to victims and witnesses in criminal cases.

[6] Policy Memorandum, paragraph 9
[7] Policy Memorandum, paragraph 144

178. Section 1 of the 2014 Act states that certain justice agencies must have regard to a list of principles in carrying out their functions relating to victims and witnesses in criminal cases. Those principles currently cover—

- The ability of victims and witnesses to obtain information about and effectively participate in cases and
- The safety of and support for victims and witnesses.

179. The Bill proposes that the justice agencies must also have regard to the principle that victims and witnesses should be treated in a way that accords with trauma-informed practice.

180. The relevant justice agencies are—

- Crown Office and Procurator Fiscal Service
- Scottish Prison Service (via the Scottish Ministers)
- Police Scotland
- Scottish Courts and Tribunals Service
- Parole Board for Scotland.

181. Trauma-informed practice is defined in section 69 of the Bill as a means of operating that—

- Recognises that a person may have experienced trauma
- Understands the effects which trauma may have on the person
- Involves adapting processes and practices, based on that understanding of the effects of trauma, to seek to avoid, or minimise the risk of, exposing the person to any recurrence of past trauma or further trauma.

182. Section 2 of the 2014 Act requires the same justice agencies to publish standards of service for victims and witnesses. The Bill would add that these standards must state how services will be carried out in a way which accords with trauma-informed practice.

183. It is important to note that the new requirement to have regard to trauma-informed practice will only apply to the five justice agencies listed above.

184. It will not apply to other organisations and individuals in the justice sector, including defence lawyers and the judiciary in court proceedings.

Conduct of proceedings in court

185. The courts already have powers to set out rules regulating practice and procedure in court proceedings.

186. Such rules could affect a range of people working in the courts, including defence lawyers who would not be covered by the provisions relating to justice agencies discussed above.

187. Part 2 of the Bill makes it explicit that these can include rules regulating proceedings in accordance with trauma informed practice.

188. The specific proposals are as follows.

189. Section 25 of the Bill amends section 305 of the Criminal Procedure (Scotland) Act 1995. The 1995 Act gives the High Court the power to "regulate the practice and procedure in relation to criminal procedure". Section 25 of the Bill explicitly states that this power includes the power to make rules "for the purpose of ensuring that criminal proceedings are conducted in a way that accords with trauma-informed practice".

190. Section 26 of the Bill adds trauma-informed practice to the list of matters which civil courts have the power to make rules and procedure about. This list is set out in the Courts Reform (Scotland) Act 2014.

Scheduling of court business

191. The Bill also contains proposals about the scheduling of court business in line with trauma-informed practice.

192. The Policy Memorandum notes that—

> "Court scheduling and churn – which is when cases do not proceed as planned, resulting in repeated hearings before they move on to the next stage – can have a traumatic impact on the experience of all those involved in a case."

193. The Lord President of the Court of Session ('the Lord President')[8] is responsible for "making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts".[9] Similarly, sheriffs principals are responsible "for ensuring the efficient disposal of business in the sheriff courts of the sheriffdom".[10]

194. Sections 27, 28, and 29 of the Bill provide that when the judiciary schedule court business they "must have regard to the desirability of doing so in a way that accords with trauma-informed practice".

195. According to the Policy Memorandum—

> "This has the objective of minimising the traumatising effect that decisions on scheduling can have on people who are involved in court proceedings, whether they are victims, witnesses, accused people, or parties to civil cases."

Need for improvement

196. The Committee took evidence from representatives of the five justice agencies which will be subject to the new requirement to have regard to trauma-informed practice.

[8] Please note that in certain contexts the Lord President is referred to as the Lord Justice General. We will use both titles in this report, depending on the context.
[9] Judiciary and Courts (Scotland) Act 2008
[10] Courts Reform (Scotland) Act 2014

197. In general, all five justice agencies welcomed the proposals and told us about the action they were taking in respect of implementing trauma-informed practice. A common theme was that it would be important that senior figures in the organisations showed leadership in this area.

198. David Fraser of the Scottish Courts and Tribunals Service explained that the Service was putting in place a three-stage implementation process which will involve staff being trauma informed, trauma skilled or trauma enhanced, depending on the level of interaction that they have with witnesses. He spoke of a process "that is designed to come from the leaders down".

199. Laura Buchan from the Crown Office and Procurator Fiscal Service ('COPFS') told us that "we are absolutely supportive and committed as an organisation to embedding trauma-informed practice". She noted that in 2022, the Crown Office developed trauma-informed training for its staff which has now been undertaken by 2,000 employees of COPFS and 70 advocate deputes.[11]

200. Chief Superintendent Derek Frew of Police Scotland said that the service was "totally supportive of the principles of trauma-informed practice" and indicated that it is already embedded in some aspects of the work that Police Scotland does. Chief Superintendent Frew told us—

> "…we need to look at culture, leadership and wellbeing in our workforce. An internal working group will take forward work to see how we can embed trauma-informed practice. It is a question of getting it into the corporate muscle memory and mainstreaming it."

201. Sue Brookes of the Scottish Prison Service ('SPS') told us that trauma-informed practice in the SPS "ought to impact on everything that we do, our senior leadership style, the executive group and the values that we put in place".

202. John Watt of the Parole Board for Scotland said "we are supportive of victims whenever we interact with them".

203. The Committee notes the commitments made by the justice agencies in support of the concept of trauma-informed practice.

204. While we welcome this commitment, it is clear to us that much progress still needs to be made.

Experience of survivors of crime

205. We have recorded in this report the compelling evidence we heard from some users of the justice system who found their experience extremely traumatic.

206. The Committee was particularly struck by the evidence we heard directly from survivors of sexual crime with experience of the criminal justice system, about the traumatic nature of their experiences.

[11] Advocate Deputes are prosecutors appointed by the Lord Advocate. Advocate Deputes prosecute all cases in the High Court and present appeals in the appeal court.

207. We have highlighted just a few examples below.

208. Hannah McLaughlan explained how the justice process made her feel. She said that—

> "…you are made to feel like you are a bit of evidence that gets put on a shelf. □ou are brought out when you are needed and you are then just disregarded afterwards. □ou feel like it is your whole life—in the lead-up, it is all that you are thinking about—but you are made to feel such a small part of the process."

209. A similar sentiment was expressed by Witness 2 who commented—

> "It can feel like the trial belongs to the accused, and it is the weirdest thing, because your body is quite literally the crime scene—it is all your data and your general data protection regulation information, but you are not entitled to find out information about the other side."

210. Witness 1 described being asked to provide details of her medical history as a child as part of her case and commented that she felt that she was "being stripped of my self and identity".

211. Witness 4 told us that she felt as if she was "missing" during the process—

> "It is not just that evidence was submitted without us being there, it is that I wasn't involved in the process. It didn't feel like anybody considered my wellbeing or that I had any autonomy."

212. A number of witnesses referred to the amount of the time they felt they had lost due to the length of the justice process. Hannah Stakes told us—

> "It defines years of your life. Every court delay changed a version of myself that I would have been and a version of the life that I would have lived."

213. □et, in contrast to these accounts from individuals who felt let down by the justice system, we also heard evidence from one survivor who had a more positive experience.

214. Sarah Ashby explained to us—

> "My experience was positive—I use that word whether or not it is correct. The system treated me well. I was taken care of, supported and convened with regularly by the police, the court and the fiscal. That went some way towards comforting me throughout the whole process."

215. We note that Sarah Ashby's experience of the justice system took place relatively recently, which may indicate an example of better practice being developed in delivering on trauma informed responses.

216. This was also acknowledged by Witness 1 who told us—

> "My trial was back in the mid-2010s [redacted]. There was only a written statement, and I was on the stand for two days giving evidence on my written statement. I know that things have changed since then, which is great to hear."

217. Nonetheless, it is clear that for many survivors, the justice process is still an inherently traumatising experience.

218. As a committee, our task is to consider whether the Scottish Government's proposals in the Bill will improve the situation, and what further action might be required.

Cultural and procedural change

219. An important point which was raised with us is that legislation is not necessarily required to deliver improvements to the experience of those involved in the justice system, though it can be a catalyst and focus for change.

220. The proposals in the Bill provide "a legislative underpinning for both necessary cultural and procedural change" in respect of trauma-informed practice, according to the Policy Memorandum.[12]

221. However, many of the cultural and procedural changes do not themselves require legislation to take forward. In the view of some of those we spoke to, they could be delivered now.

222. Anisha [redacted]aseen commented that changes in culture were as important as legislation—

> "It does not matter how much legislation you throw at this, because the issue is the culture. Nothing will change—no matter how many things you put into place—without a change in culture."

223. Ellie Wilson contrasted the approach taken in the Bill of introducing major changes such as a pilot of judge-led rape trials, with the many other improvements which, in her view, should already have been implemented—

> "…there are about 100 other issues that we should have addressed already, which would have improved conviction rates and the process. They have not been done [redacted]they have been on-going for years. I do not understand why we are not addressing some of those issues, which would create much broader consensus, and which would be much easier to resolve. Instead, however, we are going for some big issues."

224. Emma Bryson from Speak out Survivors also noted the potential for small non-legislative changes to improve the justice system. She commented—

[12] Policy Memorandum

> "Legislative changes have the power to be hugely significant, but from what I have heard today, it strikes me that, in the system that we have, comparatively small fixes also have the power to make enormous differences."

An individualised approach

225. We would like to highlight some of the key points made by survivors.

226. We heard from several survivors that not everyone will respond identically to a particular situation. As Hannah McLaughlan told us, "every survivor is different" and "what works for one person will not work for all".

227. For that reason, we heard from survivors that it is vital that justice agencies treat them as unique individuals and can offer an individualised approach in response to their stated preferences.

228. Hannah McLaughlan gave an example of where this had not happened. Court staff had incorrectly assumed that she would wish to give evidence behind a screen. She said "time and again, we were not listened to, and it involved a fight".

229. Jennifer McCann, who was involved in the same case, made the point—

> "Look at the basis of rape—your autonomy is taken from you. Giving survivors back their autonomy so that they can decide what they need or how they want to approach it is vital."

230. Witness 4 had a similar experience. In her case, she had to fight in order to get a screen in place. She commented—

> "I was very fortunate and I had special measures in place but I had to fight for them. It was like everyone wanted to say no. □ou have to specifically apply in advance to have a screen."

231. We also heard comments that justice agencies need to demonstrate consistent standards of service.

232. Jennifer McCann said she has been speaking to a fellow survivor and told us that the criminal justice system—

> "…is a postcode lottery, with a severe lack of consistency regarding procedure, support and trauma-informed practice. That is what needs to change. While the bill is a great first step, there is definitely more to be done."

233. Sarah Ashby pointed out that although she had a "positive" experience with the justice system, albeit in dreadful circumstances, she wanted to talk about her experience in order to "bring the inconsistencies to light".

234. The importance of an individualised approach in the justice system was acknowledged by the Lord Advocate, who told us—

> "Not every victim is the same. They all need to have their needs recognised and, as far as possible, bespoke packages of support to ensure that they give their

best evidence and have a good experience of the system, which is just not delivering at the moment."

Delays and postponements

235. Another important point we heard from survivors was about the trauma caused by delays in the justice process and postponements of hearings at short notice. Again, we note that legislation is not necessarily required to address these issues.

236. Witness 3 gave an example of when a hearing had been postponed at short notice without explanation—

> "I got a letter that arrived on a Saturday from, I think, the procurator fiscal, saying that the preliminary hearing that was scheduled for the following week had been postponed to October, with no explanation of why. They didn't phone me—they just sent a letter, which happened to come on a Saturday, so I couldn't phone up."

237. We also heard about the impact which the lengthy nature of the justice process could have on a personal level. Witness 2 described how it had affected her. She told us—

> "My court case was just short of four years long. I could have done so many things with my life in those four years, but you constantly feel like you are waiting. There is not much in the bill about addressing the delays and what that looks like."

238. Hannah Stakes explained the impact which the length of the process had on her—

> "People cannot be expected to wait for years. They are clinging on to their trauma and what happened to them for all that time because the trial is a memory test."

239. We have raised the issue of court delays on a number of occasions during the course of this parliamentary session. We first flagged this up in our Judged On Progress report in January 2022 in relation to the backlog caused by COVID, when we commented that—

> "…we are deeply concerned at the impact of delays on the victims of crime, the numbers of prisoners on remand, and other participants in the judicial process. Whilst we understand why the backlog has increased, we want to avoid any further slippage in the timescales for clearing this."

240. The Lord Advocate acknowledged the importance of this issue when she gave evidence. She commented that "the most fundamental procedural improvement has to be the elimination, as far as possible, of delay in such cases".

241. She also indicated that one of the challenges in reducing delays was that the various parts of the justice system operate independently of each other, but what was needed was a common understanding of what outcome was required.

242. David Fraser from the Scottish Courts and Tribunals Service told us he sympathised with those affected by delays and indicated that the courts "were working over capacity to create the ability to claw back the time that it takes to go through the court system, and we are making inroads in that regard".

243. As well as commenting on the impact of delays in the justice process, several survivors also expressed concern about the use of so-called 'floating trials'. We will discuss this practice later in this section of the report.

Communication

244. Another significant concern raised with us by survivors was the standard of communications from justice agencies.

245. Jennifer McCann argued that updates from the Crown Office and Procurator Fiscal Service should use less legal jargon. She commented—

> "I did not have a clue what was meant when we got phone calls, and then I spent hours googling and searching for information that should have been readily given to me."

246. Witness 3 described the communications she received from the Crown Office and Procurator Fiscal Service. She told us—

> "The way that they communicate with you… is by letter, and the information you're given, in which they would say, "Well, we can't tell you this. You're just a witness," were extraordinary. The manner and type of communication that you get are issues."

247. When we met informally with individuals who had a close family member lose their life because of a serious crime, they also described the poor communication from the Crown Office and Procurator Fiscal Service.

248. Anisha □aseen had concerns about the information provided by the Victim Information and Advice (VIA) service. She commented—

> "Regarding the trauma-informed element, VIA is not equipped to deliver that service... They do not understand how to support people or how to put things into words that show that they are human and they care."

249. Ellie Wilson explained that Hannah McLaughlan had got in touch with her via social media as she had no idea what to expect in relation to her case. Ellie Wilson told us—

> "I have noticed that it is survivors who are giving other survivors legal advice and telling them what to expect, because they have no other recourse to the information. That is the state of affairs that we are currently in."

250. Several survivors made suggestions for how information could be improved.

251. Jennifer McCann commented that a consistent point of contact to explain the legal process "would be more beneficial than pretty much anything else".

252. Witness 4 suggested a general 'route map' should be provided to give an outline of the justice process.

253. Witness 2 suggested that more information should be available online from COPFS and that there should be more openness about information such as who the defence counsel is.

254. Lady Dorrian, the Lord Justice Clerk, told us that in her review group's report on 'Improving the Management of Sexual Offence Cases'—

> "We made detailed recommendations about improving the quality of the information that is given to complainers and of the communication. We made a recommendation for a one-stop shop—a single point of contact…."

255. The Lord Advocate also acknowledged the importance of improving communication with survivors and argued that the development of a 'one-stop shop' for information "is a very important part of what can be done to improve matters".

Meeting advocate deputes

256. Several of the survivors told us that it would have been beneficial to have properly met with the advocate depute in advance of their trials in order to discuss their case. However, in many case the meetings had been short and, in their view, a missed opportunity.

257. Witness 1, who had experienced both a criminal and a civil trial, contrasted the experiences. She had met the advocate depute for 20 minutes in relation to the criminal trial but in relation to the civil trial she met her lawyer five or six times.

258. Some survivors felt that if they had properly discussed their cases with the advocate depute and built a relationship with them, this would have strengthened their case and increased the chance of a conviction.

259. This was also a point which was raised when we met informally with individuals who had a close family member lose their life because of a serious crime.

260. Hannah Stakes noted that, in her view, the prosecutor had missed an important point about DNA evidence which she expected he would have raised in court. However, she had not had a chance to raise this with him beforehand. She commented that the failure to raise this point—

> "…will stay with me forever. That would really have made a difference to the verdict, potentially."

261. Witness 1 was surprised that certain witnesses were not called in relation to her criminal case, and she noted—

> "I tried to give the evidence. It was because that advocate didn't know me. He didn't know the case. It's not his fault.

262. Hannah McLaughlan told us that she had no knowledge of what evidence was going to be used at the trial until it was presented.

263. Ellie Wilson told us that "the reality is that the victims are the experts in their own cases". Her view was that—

> "…if we want to improve conviction rates, the way to do that is by involving survivors in their cases. I secured some guilty verdicts in my case and I also got some not proven ones. I believe that my case would have been much stronger if I had been able to sit down with the advocate from the Crown Office and Procurator Fiscal Service and talk things over."

264. She noted that this would also help give survivors "their agency back" as well as being trauma informed.

265. By contrast, Sarah Ashby had a more positive experience of her engagement with the advocate depute. He had taken time to meet with her in advance of the trial. She commented that—

> "…I felt comforted in knowing that he knew, consistently, about my case. I felt like he was in my corner… That approach was so fundamental to my experience. I felt comfort in knowing that, when I went into the courtroom, I knew who I was sitting with. For me, the room was blocked out—I could just stand up and look at that man, whom I had met before, and take comfort in the questions that he was asking me. However, that experience is not consistent."

266. Sandy Brindley from Rape Crisis Scotland echoed the points raised by the survivors and argued that constructive meetings with the advocate depute should be taking place routinely. She noted that this might not always happen because advocate deputes sometimes receive cases late, or due to lack of resources.

267. We explored the question of complainers having access to advocate deputes with the Lord Advocate.

268. It is clear from her evidence that the Lord Advocate recognises the importance of this issue.

269. The Lord Advocate commented that one significant factor that would change the rate of convictions would be giving far better support to victims and witnesses who come to court.

270. She cited the evidence provided by Sarah Ashby as an example of how, in her view, progress had been made in increasing the availability of advocate deputes to support complainers before their trials.

271. She indicated that when she was appointed Lord Advocate in June 2021, only 32 advocate deputes were in post which put them under significant pressure of work. She commented—

> "We were asking far too much of a very small group of people. The availability of individuals to consult before trial and to be given a case in good time before a trial was heavily compromised."

272. The Lord Advocate commented that she had "recognised that what was being provided for victims of sexual crime was simply not good enough". She told us that,

through recruitment efforts which had been made, there were now 70.5 advocate deputes in post, with the goal of reaching 77.5 posts.

273. The Lord Advocate indicated that it was now the case that for the most serious and difficult cases, an advocate depute is allocated at the point at which the case is reported to the Crown Office. This allows the advocate depute to meet the victim at least twice before their trial to discuss their evidence and how it might be taken.

274. However, she made the point that—

> "That is how I would like all the cases to be done, but we simply cannot do that. We simply do not have the resource."

Independent legal representation

275. Several survivors highlighted the importance of having access to independent legal representation.

276. We will discuss this further in the section of the report covering Part 6 of the Bill.

Impact of legislation – will it make a difference?

277. Turning now to the specific proposals in Part 2 of the Bill, we heard strong support for the principle of embedding trauma-informed practice in the justice system from virtually everyone we heard from.

278. However, there were some views expressed that passing new legislative requirements to have regard to trauma-informed practice would not, in itself, guarantee the delivery of trauma-informed practice in the justice system.

Accountability

279. Sandy Brindley from Rape Crisis Scotland noted that the Victims and Witnesses (Scotland) Act 2014 already set out "very positive statutory obligations on justice agencies" but "they are simply not being met". She told us—

> "I share the concern about adding another right to the list of obligations or principles in relation to trauma-informed practice without taking action to ensure that those rights are enforceable. If they are not enforceable, they are not meaningful rights."

280. She went on to say that, in relation to the 2014 Act—

> "There is a gulf between what that legislation says and what is happening in practice, and the challenge is how we bridge it. I do not think that the solution is to put into the bill more words about what we mean by trauma-informed practice. Instead, I think that it is about recognising those mechanisms."

281. □ate Wallace of Victim Support Scotland expressed the view that the Victims Commissioner would have a key role in that regard. She told us that—

> "Those rights and the standards of service are only meaningful if they are effectively monitored and agencies are held accountable for complying with the standards."

282. Witness 2 made a similar point about the monitoring of standards—

> "It's all very well saying that there's going to be trauma-informed practice, but how are you going to regulate that and monitor it? Where it's not trauma informed, will there be a route for complaints?"

283. Sandy Brindley of Rape Crisis Scotland told us that her view was that the most effective way to enforce victims' rights in legislation is to give sexual offence complainers access to legal representation.

284. Dr Marsha Scott of Scottish Women's Aid argued that improved availability of data is required in order to hold justice agencies accountable for improving standards. She commented—

> "Unless we associate the standards that we would like to be implemented with data collection and, indeed, equalities data, it will be very difficult to hold the Lord Advocate, the chief constable or any of those people accountable."

More than a 'tick-box' exercise

285. We also heard views that the delivery of trauma-informed practice will require more than just passing new legislation. It will also need to be properly implemented on the ground by the relevant justice agencies.

286. In its written submission, Criminal Justice Voluntary Sector Forum noted that its members—

> "were keen that 'trauma-informed' not be reduced to a 'buzz word' and that changes are properly considered."

287. Hannah McLaughlan made a similar point—

> "It cannot be stand-alone training that is done just to tick a box. It has to be on-going, because, over time, new research will come out about how trauma works."

288. Ann Marie Cocozza of Families and Friends Affected by Murder and Suicide (FAMS) cautioned against trauma-informed practice becoming "a half-day tick-box exercise".

289. Dr Caroline Bruce of NHS Education for Scotland explained that effective change in relation to trauma-informed practice comes from a wide variety of factors. She commented—

> "…where we see effective change, it is because there is training in combination with culture, implementation supports—with regard to observation, coaching and practice—and feedback loops. All of those things, however they may be brought into play, are critical in bringing about changes in practice. It goes from training, to practice, to systems change."

290. While some witnesses noted that legislation may not, in itself, deliver change, we also heard that the new legislation could act as a focus to encourage the delivery of trauma-informed practice.

291. The Policy Memorandum commented—

> "Although trauma-informed practices can be adopted without legislation, legislating is a powerful tool to promote change across the sector, by enshrining trauma-informed practice as a priority for justice agencies and requiring them to report on its implementation."

292. Lady Dorrian, the Lord Justice Clerk, argued that trauma-informed practice should be embedded in legislation because it will provide the legislative impetus towards creating that necessary culture change.

293. Sarah Ashby told us that legislation is required in order to improve the consistency of how survivors are treated in the justice system. She argued that "it is incredibly important that legislation dictates that consistency".

294. □ate Wallace of Victim Support Scotland argued that "if we do not enshrine trauma-informed practice in legislation, and state that it is an ambition for the justice system in Scotland, we will never achieve it".

295. The Lord Advocate argued that embedding trauma-informed practice in legislation will mean that "people will recognise it as a statutory responsibility that must be adhered to and cannot be ignored".

More specific requirements in legislation

296. The approach set out in Part 2 of the Bill is that it requires that the five named justice agencies have regard to trauma-informed practice. However, it is for each organisation to decide how this should be done. This approach is summarised in the Financial Memorandum which states, in relation to trauma-informed practice—

> "The Bill does not mandate a specific approach to implementing provision in this area so decisions on how to implement it will be for each agency."

297. We heard some views which suggested that the Bill should specify, to a greater extent, what trauma-informed practice should look like in the justice system.

298. The written submission from Dumfries and Galloway Council argued, for example, that "training should be mandatory, of a high standard and consistent across organisations".

299. A written submission from Rape Crisis Scotland argued that improved communication with victims and witnesses was a necessary component of trauma-informed practice. Rape Crisis Scotland felt there should be "a clear legislative requirement on the court and the COPFS to provide survivors with information regarding their case in a timely fashion".

300. In a written submission, the Equality and Human Rights Commission. recommended that provision is made on the face of the Bill, or in accompanying statutory guidance, that data on the use of trauma-informed practice must be collected and monitored to enable learning about what works in supporting victims and witnesses.

301. Dr Marsha Scott of Scottish Women's Aid told us—

> "We agree with the intent of the bill, but it needs to be much more specific. We need to have really explicit commitments. The bill will not say exactly what it should look like for each individual area, but we need a set of standards that can be applied in holding organisations accountable for identifying behaviour that is not appropriate."

Resources

302. Another issue which was raised with us was the resource implications of the provisions in the Bill on trauma-informed practice.

303. The only specific figures provided in the Scottish Government's Financial Memorandum in relation to Part 2 of the Bill are for the costs of training staff in trauma-informed practice for the Scottish Courts and Tribunals Service, Police Scotland and the Parole Board for Scotland.

304. In various other areas, the Financial Memorandum notes that it is not possible to quantify the costs of implementing measures to promote trauma-informed practice as it is yet to be decided what specific measures will be required.

305. For example, the Financial Memorandum notes that the Crown Office and Procurator Fiscal Service envisages that adapting processes to make them more trauma-informed will have resourcing implications. However, it states that—

> "Specific decisions in these areas will only be taken once the legislation is approved, and so costs arising from such resourcing implications cannot be quantified at this stage."

306. Similarly, in relation to the Scottish Courts and Tribunals Service, the Financial Memorandum notes that the cost of reviewing the written materials and communications it produces "cannot be fully determined at this stage as it will depend on a number of factors".

307. The Financial Memorandum also mentions that a wider review of the Scottish Court estate might be needed, to consider what reasonable adaptations could be made to support a trauma-informed approach, but "the costs of such an exercise, if progressed in any way, cannot be quantified at this juncture".

308. The written submission from the Scottish Courts and Tribunals Service emphasised that the costs for trauma-informed training "will be subject to a number of variables (e.g. format, duration, content and objectives of any such training) some of which the SCTS may have limited control over".

309. Chief Superintendent Derek Frew of Police Scotland indicated that work was underway to develop bespoke training in trauma-informed practice for certain roles but commented that "we do not have a finished product" and noted that—

> "The issue is the time, the cost and what those packages look like within the myriad other demands."

310. Laura Buchan from the Crown Office and Procurator Fiscal Service told us that regular engagement with victims and witnesses requires investment, refresher training, development of other training, and changes to policy and guidance. She noted that "those are all things that require additional resource, and they cannot simply be absorbed by the budget that we already have".

311. In its written submission, Children 1st expressed concern that "it is entirely possible that this Bill will pass without any clear understanding of what will follow and how much this will cost". The submission went on to comment—

> "We believe this Bill is the right opportunity to offer parliament some sense of how and when public funding might be needed to support the changes needed in this Bill, and this should be clarified further as the Bill goes forward."

312. One of the survivors who gave evidence argued in favour of maintaining funding for advocacy workers. Witness 1 commented—

> "We can't cut funding or not give stable funding, because that is what we need. We're not sitting here to try to change conviction rates or send more people to prison□we just want to survive, give our evidence, get to trial and finish it. We need adequate funding."

313. Another perspective on resources was provided by Sarah Ashby who argued that some changes, such as improved communication, need not be difficult to implement. She commented that "I am not entirely sure that trauma-informed practice needs to be costly".

314. We asked the Cabinet Secretary for her views on the resource implications of Part 2 of the Bill. She commented that "it is important to remember that not all of what the bill seeks to do is about additional resource, although I do not demur from the reality that there is a cost to the bill". She also noted—

> "Some of this is not about additional duties but about changing what we do at the core…Some of this is about approach, culture and practice, as well as being about resources."

Definition of trauma-informed practice

315. We will now discuss some of the specific details of the Scottish Government's proposals in the Bill to embed trauma-informed practice in the justice process.

316. One key issue which the Committee raised with witnesses was whether the definition of "trauma-informed practice" in the Bill was the right one.

317. As we have discussed above, in the Bill "trauma-informed practice" is defined as follows—

> "A means of operating that—
>
> - Recognises that a person may have experienced trauma
> - Understands the effects which trauma may have on the person
> - Involves adapting processes and practices, based on that understanding of the effects of trauma, to seek to avoid, or minimise the risk of, exposing the person to any recurrence of past trauma or further trauma."

318. The Policy Memorandum states that the definition in the Bill has been developed—

> "…to align with work already underway across the justice sector, particularly the 'Knowledge and Skills Framework' which will be a key resource to support a trauma-informed and responsive workforce across the sector."

319. The background to the creation of the 'Knowledge and Skills Framework' is as follows.

320. In 2021, NHS Education for Scotland was commissioned by the Scottish Government, in consultation with the Victims Taskforce, to create the □nowledge and Skills Framework specifically to support the development of a trauma-informed workforce in the justice sector. The Framework was endorsed by the Victims Taskforce in December 2022.

321. According to the Policy Memorandum, the Framework will help justice organisations identify the knowledge and skills to respond to victims and witnesses of crime in a trauma-informed way. It is also designed to support the development and delivery of training in trauma-informed practice.

Views of NHS Education for Scotland

322. The Committee took evidence from Dr Caroline Bruce, Head of Programme, Transforming Psychological Trauma at NHS Education for Scotland.

323. As we have discussed, NHS Education for Scotland created the □nowledge and Skills Framework and has been a key partner in the national trauma training programme. As part of that work, Dr Bruce has been working with a range of different partners in the implementation of trauma-informed practice.

324. Indeed, several witnesses from organisations in the justice sector specifically mentioned training provided by Dr Bruce and NHS Education for Scotland.

325. David Fraser from the Scottish Courts and Tribunals Service told us—

> "On the quality of the training, it is the best that we could have. Dr Caroline Bruce has been highly involved in working with people in the Judicial Institute to develop the training and to roll it out to the judiciary."

326. Laura Buchan from the Crown Office and the Procurator Fiscal Service and Chief Superintendent Derek Frew of Police Scotland also referred to working with Dr Bruce and NHS Education for Scotland.

327. Witness 2 told us that she worked on the trauma-informed justice framework and commented—

> "I think it's one of the most amazing pieces of work that has ever been done. It was designed to be given to agencies so that they would then create their own trauma-informed training themselves—within the agencies."

328. We asked Dr Bruce if she was happy with how the Bill defined trauma-informed practice. She told us—

> "There is a huge amount that the definition in the bill will achieve. Resisting retraumatisation is not a simple thing to do but it is a huge step forward, and there is an awful lot in the framework that talks about that. It applies across a range of different settings."

329. However, she also said—

> "There are additional elements that we would like to see aligned, given that the knowledge and skills framework is here."

330. The written submission from NHS Education for Scotland elaborated on the nature of these "additional elements". The submission welcomed Part 2 of the Bill in general but suggested that the definition of trauma-informed practice in the Bill should be "more fully aligned with the agreed consensus definition contained in the framework".

331. The NHS Education for Scotland submission noted that the agreed aims published in the framework are—

> i. Recognise the impact and prevalence of trauma on witnesses
> ii. Prevent re-traumatisation and further harm
> iii. Adapt practices so that they support (or avoid inhibiting) recovery
> iv. Adapt to the impact of trauma to ensure effective participation and best evidence
> v. Support the resilience of the workforce in the face of exposure to vicarious trauma.

332. The NHS Education for Scotland submission commented that the definition of trauma-informed practice in the Bill "…reflects the first two aims but stops short of the remaining two aims that relate to witnesses (aims 3 □ 4)". It also stated—

> "To focus solely on re-traumatisation without mention of recovery and participation is unlikely to address some of the key issues that witnesses told us were fundamental to improving their experiences, and that leaders and science told us were necessary to improve the quality of evidence and the justice process in prosecuting traumatic offences such as rape and sexual assault."

333. The written submission from NHS Education for Scotland went on to state that—

> "In our view it is essential to attend to both the need to adapt processes and practices to be actively restorative / support recovery, and ensure we minimise the significant barriers that the impact of trauma can create on effective participation for witnesses. Leaving out these key elements from the definition may also hinder the effective implementation of other elements of the Bill."

334. Some of the survivors who gave evidence discussed the importance of having a wide definition of trauma.

335. Witness 4 commented that—

> "The bill obviously talks about the way in which trauma-informed practice will be embedded throughout, but the definition of trauma-informed practice is very narrow. It's so important that we get that right and that we understand that trauma isn't just a buzzword that we use to talk about an experience or a set of experiences."

336. Hannah McLaughlan made the point that what is fundamental in trauma-informed practice is having the knowledge and understanding that trauma impacts people in different ways.

Position of the Scottish Government

337. The Committee asked the Cabinet Secretary for her views on the definition of trauma-informed practice in light of the comments by Dr Caroline Bruce and the written submission from NHS Education for Scotland.

338. The Cabinet Secretary explained that—

> "…the legal definition is closely aligned with the knowledge and skills framework and all the work that NES and Dr Caroline Bruce have undertaken. The definition in the bill is not exactly the same, word for word, as the definition in the framework because the bill does not exist in isolation from other legislation. The bill is adding trauma-informed practice to the list of principles in the 2014 act."

339. However, she went on to say that "our door is always open, particularly at stage 1" and commented—

> "We will always have an open mind and an open door when it comes to engagement on the detail. The only caveat is that it is important that legislation brings clarity of meaning and purpose, and it is important that changing the letter of the law does not have any unintended consequences."

340. The Cabinet Secretary was asked if the question of the changing the definition was "on or off the table" and she said "it is on the table".

Conduct of court proceedings

341. Another important theme which emerged in evidence was the extent to which trauma of victims and witnesses is caused by way in which court proceedings are conducted.

342. In particular, we have heard views that in some instances the conduct of defence lawyers has contributed to victims and witnesses experiencing trauma. It has also been alleged that the adversarial nature of a court means that this trauma is inherently difficult to prevent.

343. We will discuss these points below. We will then go on to discuss what the Bill proposes to do in respect of conduct in court proceedings.

Views on trauma caused by conduct of court proceedings

344. The written submission from Rape Crisis Scotland noted "we have seen far too many examples of cruel and distressing cross examination of survivors which have been subject to judicial criticism".

345. One case which exemplifies the themes that we heard throughout from victims and survivors about court experiences was *McDonald v HM Advocate* in 2020 which was cited in the Policy Memorandum. Rt. Hon. Lord Carloway, the Lord Justice General, stated—

> "This trial was conducted in a manner which flew in the face of basic rules of evidence and procedure, not only the rape shield provisions but also the common law. It ignored a number of principles which have been laid down and emphasised in several recent decisions of this court. If justice is to prevail in the prosecution of sexual offences, it is imperative that those representing parties abide by these basic rules. If they do not do so, the judge or Sheriff must intervene to remedy the matter. During her cross-examination, this complainer was subjected to repetitive and at times irrelevant questioning. She became extremely distressed and rightly so. The court did nothing to intervene. Were this to be repeated, the situation in sexual offences trials would be unsustainable."

346. The written submission from Rape Crisis Scotland referred to this case and stated—

> "The court should be under an obligation to prevent this type of conduct and place an onus on the defence to adhere to trauma-informed standards. Cross examination is a means to test evidence and protect against miscarriages of justice, but this does not need to be at the expense of the fair treatment of the complainer."

347. Bill Scott from Inclusion Scotland commented that the Faculty of Advocates needed to be told—

> "□ou need to adopt trauma-informed practice, because you are not doing it at the moment. □ou are subjecting the victims of crime to additional trauma and putting them on trial when they are the victims."

348. We heard first-hand evidence from survivors who were critical of the conduct of defence lawyers.

349. Witness 2 told us "basically, advocates are taking advantage of trauma on the stand", for example, by cross-examining complainers on specific small details relating to the case.

350. She commented—

> "Take advantage of the truth—find the justice. That is what our justice system should be. It shouldn't be about breaking down a character witness until they don't remember what their name is. That is the reality of trauma and complex post-traumatic stress disorder—it really messes up your brain."

351. Several witnesses commented that defence lawyers treated court proceedings and the cross-examination of witnesses as "theatre".

352. Hannah Stakes told us that "some of the theatrics that go on within a courtroom are not really about the truth or the evidence but about weaving a story".

353. Hannah McLaughlan described the defence as using "a smokescreen" and went on to comment—

> "I strongly believe that defence lawyers need to be trauma informed—that must be a fundamental part of their practice. When you are on the witness stand, you should not be made to feel embarrassed, humiliated or undermined by someone."

354. When we met informally with individuals who had a close family member lose their life because of a serious crime, they described the language and tactics used by some defence lawyers as being extremely traumatic. Some expressed concern that the Bill would not require defence lawyers to undertake trauma-informed training, but instead proposes to leave conduct to court rules.

355. We put some of the concerns which were raised with us to the legal profession.

356. Jonathan Campbell of the Edinburgh Bar Association accepted there were "individual cases where the conduct has been below that which might be expected" but argued that in general the legal profession understands the need to take a careful approach to cross-examination. He felt that some of the criticisms were "unwarranted and some are outdated".

357. Jonathan Campbell speculated that some of the difficulties faced by witnesses being cross-examined is that they might not have been fully appraised of what to expect. It may also have been the first time that their account had been challenged or that they had felt not believed.

358. Finally, he emphasised that the judiciary should intervene in the event of defence lawyers asking aggressive or persistent questions. He said that the judiciary is "acutely aware of the criticisms that are often made, and it is alive to any instances of misconduct on the part of defence lawyers".

359. Written evidence from the Faculty of Advocates stated—

> "Whilst Faculty supports the promotion of trauma-informed practice through specifically highlighting the issue within key legislation, Faculty remains of the view that legal professionals within the justice system already possess the necessary skills and experience required to recognise and adapt practices for the benefit of persons who may have experienced trauma."

360. Stuart Munro of the Law Society of Scotland argued that "fairly substantial" changes had already been made in court proceedings, for example complainers typically giving evidence via commission in the case of rape trials. He commented that current practice—

> "…is almost unrecognisable from practice, say, 10, 20 or however many years ago, and it is an entirely new process that is, I think, likely to have transformed the experience of complainers."

361. Stuart Munro also made the point that there were other features of court proceedings which should be examined if trauma-informed practices are to be adopted, such as delays to proceedings and better communication with complainers.

362. He also noted that the Law Society of Scotland has already developed a comprehensive and heavily subscribed course on trauma-informed practice for solicitors.

363. On this subject, Jonathan Campbell of the Edinburgh Bar Association stated that—

> "Formalised training does not currently exist and I think that a uniform and comprehensive package of training would be to the benefit of the whole profession."

Adversarial nature of court proceedings

364. We explored with witnesses whether the adversarial nature of court proceedings (and, in particular, the cross-examination of complainers and witnesses) meant that it was fundamentally incompatible with the adoption of trauma-informed practice.

365. We took evidence from Professor Thanos □aratzias, Professor of Mental Health at Edinburgh Napier University and Clinical and Health Psychologist at the Rivers Centre for Traumatic Stress. He pointed out that "the ability to give accurate evidence would be strongly determined by the level of recovery that someone is in". He noted that for some individuals who have not had the chance to process a traumatic event—

> "if that group of people found themselves in that adversarial setting… they would react quite negatively and the quality of evidence that they give would clearly be compromised because of that."

366. Graham O'Neill from the Scottish Refugee Council noted that refugees are a highly traumatised population with significant additional vulnerabilities, and he considered that "putting those people into an adversarial situation is inherently traumatising".

367. Professor Vanessa Munro of Warwick University commented that the adversarial courtroom is not a space that was designed for dealing with sexual offence complaints or complainers. Although special measures and rape shield protections have helped address some of the excesses of the adversarial system, "such measures often sit on the periphery of an adversarial process, as exceptions to the norm".

368. Written evidence from the Equally Safe Edinburgh Committee argued that there needed to be a fundamental rethink of the justice system if trauma-informed practice is to be adopted as an adversarial system is not designed to be trauma-informed.

369. Dr Caroline Bruce from NHS Education for Scotland thought it was important to understand the way that trauma can impact on someone's memory after a traumatic event and to ask questions in a way that is likely to get better and more coherent evidence. She referred to "the balance between the right to a fair trial and trauma-informed practice" and said "this is where the subtle nuance comes into play".

370. Witness 2 commented that she was "not sure that complainers and survivors give their best evidence when they are traumatised and if they are just pulling out little bits of the story".

371. However, we heard views from the legal profession that an adversarial system was not necessarily incompatible with adopting trauma-informed practice.

372. Stuart Munro of the Law Society of Scotland commented that the court's job is to determine which account is correct and this inevitably involves witnesses being challenged on the veracity of their account. However, he felt that it was possible to do this in a trauma-informed way.

373. He noted that the idea that the justice system in Scotland should move to a non-adversarial system was an "enormous question". He commented that "it is always legitimate to ask whether we would be better off starting from scratch, as it were, but that would be an enormous and complex process".

374. The Crown Office and Procurator Fiscal Service, in written evidence, noted that inevitably witnesses will be required to discuss events which may have been very traumatic, but these challenges do not prevent the criminal justice sector from seeking to operate in a manner that seeks to avoid traumatisation.

375. David Fraser from the Scottish Courts and Tribunals Service noted his view was that the judiciary has control of a courtroom, and they have an important role to play. He commented that—

> "It is absolutely essential—again, this is my view—that they have empathy and can understand what is happening, detect when a situation is developing and anticipate that that is creating trauma. It is then up to them how the court is managed."

376. Lady Dorrian, the Lord Justice Clerk, told us that all judges and temporary judges in the High Court have had trauma-informed training and—

> "No system is 100 per cent foolproof, but the matters that were a cause for concern at the time of the report have improved enormously. Judges are far more interventionist than they used to be and lawyers are generally behaving better. There are instances of bad practice, but we are aware of that and are dealing with it."

377. The Cabinet Secretary commented that when it came to the experience of complainers in court "there are benefits in taking a more inquisitorial approach as opposed to an adversarial approach".

Approach in the Bill to the conduct of court proceedings

378. The Policy Memorandum acknowledges that "the way in which a defence is conducted is often highlighted by victims as one of the most distressing aspects of the justice process, and can contribute to their re-traumatisation".

379. As we have discussed above, the defence and the judiciary will not be subject to the provisions in the Bill which specify the five justice agencies which must have regard to trauma informed practice.

380. Instead, according to the Policy Memorandum, the approach taken in the Bill is to—

> "…ensure the courts can make operational changes to court procedure and practices that help embed the principles of trauma-informed practice in the conduct of court business, with the objective of improving the experience of people involved in court cases and minimising the risk of retraumatising them."

381. Specifically (as we have noted already) the Bill makes it clear that court rules can be used for the purpose of ensuring that court proceedings are conducted in a way that accords with trauma-informed practice.

382. This might include, for example, codifying a requirement for the respectful questioning of witnesses.

383. However, the Bill does not, itself, provide for any specific changes to court rules.

384. The Policy Memorandum notes that an alternative model to ensure that court proceedings are conducted in accordance with trauma-informed practice would have been to amend the Legal Services (Scotland) Act 2010. This sets out the professional principles that people who provide legal services are required to follow.

385. The Scottish Government considered whether a new professional principle on trauma-informed practice could be added to that Act. However, it concluded that this would not be an effective or proportionate way of improving people's experiences of the justice system. The Policy Memorandum elaborates on the Scottish Government's reasoning, including explaining that there would be challenges enforcing such a principle, particularly in relation to the conduct of a defence agent in the course of a trial.

386. It is worth noting that Part 5 of the Bill proposes some additional requirements in relation to trauma-informed practice which would only apply to the proposed new Sexual Offences Court.

387. The Policy Memorandum explains that, in respect of the new court the Bill provides for a requirement for solicitors, solicitor advocates and advocates who wish to appear in the Court to successfully complete specialist trauma-informed training in sexual offence cases, as approved by the Lord President.

388. In addition, judges would only be eligible for appointment as a judge of the Sexual Offences Court where they have completed approved training on trauma-informed practice in sexual offence cases.

389. We asked the Cabinet Secretary for her comments about the conduct of court proceedings. She told us—

> "As you would expect, I have engaged with the Faculty of Advocates, criminal defence lawyers and victim support organisations. The purpose of Lady Dorrian's review was to look at how we could improve the experience of victims who are going through the justice system without compromising the rights of the accused. There is always a balance to be struck there."

Floating trials

390. The final issue we wish to discuss in relation to trauma-informed practice relates to the use of 'floating trials', sometimes referred to as a 'floating diet'.

391. According to the Policy Memorandum, it is normal practice for a trial to be allocated to a five day period, and it may start at any time during that period (known as the 'float'). A complainer will not know in advance exactly when their case will be called within the float, and may be given just one working day's notice.

392. The Bill does not propose to legislate to prevent the use of floating trials.

393. Instead, as we have discussed above, sections 27, 28 and 29 of the Bill will require the judiciary to consider trauma-informed practice when criminal and civil court business is being programmed. However, there will still be an overarching requirement for the judiciary to make arrangements for "the efficient disposal of business in the Scottish courts", as there is now.

394. The Policy Memorandum also explained why the Bill does not legislate to provide for fixed trial dates. It acknowledges the potential advantages of doing so, in terms of providing certainty to complainers. However, it goes on to note that if all trials were set for fixed dates but then some did not proceed as programmed, the court would sit unused for the remaining time on that day.

395. According to the Policy Memorandum, the Scottish Courts and Tribunals Service has estimated that moving entirely from floating trials to fixed trials in the High Court would add an average of at least 11 weeks of additional delay to each individual

case's trial date. There would also be an impact on clearing the backlog in criminal cases.

396. In subsequent correspondence with the Committee, the Scottish Courts and Tribunals Service told us that it had conducted further analysis on the impact of the introduction of a switch to fixed trials in the High Court. This indicated that a minimum of 22 weeks would be added to the average waiting period for complainers, vulnerable witnesses and accused. The letter stated that, based on the current average waiting times, a switch to a fixed trial model could lead to waits of 68 weeks, in contrast to the current 46 weeks.[13]

397. The Policy Memorandum refers to "the tensions between the earlier dates a floating diet can offer and the relative certainty a fixed trial date can offer" and concludes that—

> "the Scottish Government considers that prohibiting or restricting the use of floating trials in the Bill would not achieve the policy objective of improving people's experience of the justice system – and could inadvertently make many people's experiences worse."

398. Having said that, the Policy Memorandum stresses that the Scottish Government supports the aspiration to reduce the use of floating trials where that can be done without negatively impacting people's experiences. However, it "does not believe that prescriptive legislation is the most constructive way to achieve that".

Views on floating trials

399. The use of floating trials has been criticised by many as adding to the trauma and stress faced by complainers.

400. We heard directly from survivors of sexual crime about the impact which floating trials had on them.

401. Witness 2 explained the reasons why floating trials can add to the trauma experienced by survivors—

> "…floating trials are not very good because you are having to remember 10 or 11 dates that will always be significant to you… Dates are massive for people suffering with post-traumatic stress disorder and complex post-traumatic stress disorder.

402. We also heard from Witness 1 about her experience of floating trials—

> "For me, it wasn't a fixed date—it was a sort of floating date… when I was away on holiday overseas, they called me up to say, "We've moved your date to two weeks' time. You need to come back, to be here for the trial." So, I wasn't able to live my life, because I was dictated by their dates and what was suiting them."

403. Sandy Brindley of Rape Crisis Scotland commented that "if we are serious about having trauma-informed practice, the most basic thing that we should be doing is to

[13] Letter of 1 February 2024

not use floating trial diets in rape cases". She described the negative impact of floating trials on survivors in the following terms—

> "People talk about putting their life on hold for years. Some talk about rehearsing: every morning, they wake up and go through in their mind what will happen in court and the evidence that they are going to give. That distress and anxiety is worsened by the lack of certainty. People have a trial that is allocated to a certain period, and every night they are waiting on a call to tell them whether it is going to go ahead the next day. That is far from trauma-informed practice, and it is not how we get the best evidence from vulnerable witnesses."

404. The written submission from Rape Crisis Scotland argued that the Bill should include a specific commitment to dispense with floating trials in rape and sexual offences cases.

405. □ate Wallace of Victim Support Scotland acknowledged the trade-off between certainty for complainers and the risk of courts being left empty but argued that there should be a better scheduling process to ensures that cases assigned floating trials do not have vulnerable witnesses in them. She also commented that when she had spoken to victims, they would have preferred certainty about the date of their trial, even if it had meant a delay of a couple of months.

406. The written submission from the Scottish Courts and Tribunals Service explained that the floating trial model "currently provides and supports greater flexibility for case scheduling and the utilisation of finite court room, judicial and staff resources to respond to them".

407. The Lord Advocate told us about her own experience of prosecuting sexual cases in the High Court and the trauma caused to victims of waiting for a phone call at 4.00 pm to find out if they are being called to give evidence. She felt that recording of testimony might assist in this regard, but some victims would wish to see the accused in court. She noted that—

> "…floating trial diets are a profound problem. They are deeply upsetting for victims who are waiting for their case to be heard, and challenging for the prosecutor who is waiting for the case to come in."

408. She went on to comment that "the process is just not conducive to trauma-informed practice".

409. The Lord Advocate commented "I hope that the specialist court could assist in the move towards doing away with floating trial diets".

410. We asked the Cabinet Secretary for her comments on the use of floating trials. She told us—

> "I certainly acknowledge that uncertainty for victims is undesirable. The Government's position is that we are supportive of reducing the use of floating trials. We have not introduced any measures to ban their use□in essence, that is because we are still tackling a court backlog.

We have taken a more flexible approach whereby courts would be required to consider trauma-informed practice when scheduling their business. However, we are supportive of a shift in culture."

411. The Cabinet Secretary went on to comment—

"I certainly want their use to be reduced. I acknowledge that it is a matter of live debate just now, and that I need to be cognisant of a range of voices. I know that, for victims, uncertainty is a factor that causes real distress. I am being somewhat cautious because I think that, at this point in time, if we took a more inflexible approach, that would cause further harm and distress, and I therefore think that a more flexible approach is the appropriate response."

Conclusions and recommendations

412. The survivors who gave evidence to the Committee made a compelling case for the importance of trauma-informed practice being adopted in the justice system. The significant and unnecessary trauma they faced during their journey through the criminal justice system is unacceptable. A court trial may bring with it some degree of challenge but it should not be a traumatising experience because of how they operate.

413. We are therefore in no doubt of the importance of embedding trauma-informed practice which will enable victims to give their best evidence. It is a theme which runs through our whole consideration of the Bill.

414. There has been some debate as to whether legislation is necessary in order to embed trauma-informed practice in the justice system and change the culture. Some Members believe that legislation is required to drive forward improvements, but it will only be effective if the provisions in the Bill are sufficiently strong and clear enough. They believe that if there are clear legislative requirements, then those in the justice sector can be held accountable for meeting those standards. Their view is that strong legislation is also a marker of how seriously Parliament views the adoption of trauma-informed practice and this in turn can promote cultural change. Other Members question whether a legislative approach to embedding a trauma informed approach is necessary and would be effective.

415. We believe that the legislative provisions could be strengthened. We have several recommendations on how to do this.

416. First, the Bill proposes that five justice agencies must have regard to the principle that victims and witnesses should be treated in a way that accords with trauma-informed practice. We do not disagree with this objective but believe that the Bill must be more ambitious in how it approaches this subject. It must be more than a 'tick-box' exercise. Our view is that justice agencies have been 'having regard' to trauma-informed practice for some time now, but this has not delivered the required pace of improvement. We recommend that the Bill should be strengthened to provide that the justice agencies do more than

offer everyone a short training course. They should also proactively be required to undertake an audit of their functions and report on whether they are trauma-informed and, if not, what proposals they intend to put in place to remedy this.

417. Second, we believe that the definition of trauma-informed practice in the Bill requires to be strengthened. We recommend that the definition in the Bill should be amended to bring it in line with that put forward in the □nowledge and Skills Framework created by NHS Education for Scotland. In our view, this Framework represents the gold standard on how to support trauma-informed practice in the justice sector. The definition of trauma-informed practice in the Framework is comprehensive and, crucially, includes reference to supporting recovery and ensuring participation. We recommend that this definition should be adopted in the Bill.

418. Third, our view is that a 'whole system' approach needs to be taken to embedding trauma-informed practice in the justice system. This includes addressing the concerns which have been identified about the trauma which can be caused by cross-examinations in court if it is not conducted in a trauma-informed manner. We think it is vital that all participants in the court should be required to conduct themselves in a manner that accords with trauma-informed practice. This is the principle being followed for the proposed new Sexual Offences Court, in which judges and defence lawyers will be required to undertake training in trauma-informed practice before attending this court. We see no reason why these training requirements should not be extended to defence lawyers and judges participating in all court proceedings. We recommend that they should be.

419. Furthermore we note that the Bill contains a provision which makes it clear that court rules can be used for the purpose of ensuring that court proceedings are conducted in a way that accords with trauma-informed practice. However, this appears to us to be somewhat non-prescriptive in nature. The Bill does not, itself, provide for any specific changes to court rules. Whilst recognising the independence of the judiciary, we recommend that these provisions should be strengthened to specifically require that court proceedings must be conducted in line with trauma-informed practice.

420. Finally, we have heard clear evidence of the trauma caused by floating trials, when complainers might not have any idea until 4pm on a given day whether or not their trial will be commencing the next day. This practice is clearly not conducive to trauma-informed practice and can cause significant distress. Nevertheless, we do understand the reasons why a limited number of floating trials might be necessary in terms of keeping overall delays down. We heard evidence from the Scottish Courts and Tribunals Service that moving to fixed trial dates in the High Court could lead to a minimum of 22 weeks being added to the average wait for complainers.

421. Regrettably, we do not think it is realistic to legislate to prohibit the use of floating trials completely. Instead, we recommend that the Scottish Courts and Tribunals Service should make every effort to keep the use of floating trials to the absolute minimum that is required. We see this as being a particular priority in the proposed new Sexual Offences Court. We further note the evidence that

some victims would be willing to wait longer for their case to come to court if there was certainty as to the date. However, we are also aware that some may prefer an earlier date if one was made available through the use of a floating trial. We recommend that the Scottish Courts and Tribunals Service consider the feasibility of allowing victims that choice.

422. Turning now to the resources required to deliver trauma-informed practice, we note that the Financial Memorandum indicates that many of the funding requirements have yet to be quantified because decisions have yet to be taken on what specific measures will be taken forward. We will no doubt return to this issue when we come to consideration of future draft Scottish Government budgets. For now, we note that implementing effective and sustained training in trauma-informed practice is a key priority and should be properly resourced.

423. The final point which we want to raise is that legislation is not necessarily required to deliver improvements. We are very grateful to the survivors who highlighted to us some of the cultural and procedural changes which in their view could, and should, be delivered now. We have outlined these in our report. Some of these changes need not necessarily be costly. They could be as simple as avoiding legal jargon when updating survivors on their case. We also note that justice agencies need to treat survivors as individuals and tailor their support to their specific needs. Criminal justice agencies should be mindful of and responsive to any emerging research around trauma-informed practice.

424. We were particularly struck by the evidence we heard about the benefits which could be realised by arranging for a complainer to properly meet with the advocate depute prosecuting their case in advance of their case coming to court. We heard strong evidence that establishing this relationship helps to reduce the trauma experienced by survivors when they give evidence. Furthermore, allowing survivors to discuss the details of their case and build a relationship with the advocate depute has the potential to improve the quality of their evidence, strengthen their case, and potentially increase conviction rates as a result.

425. We welcome the fact that this is something to which the Lord Advocate is committed.

PART 3: SPECIAL MEASURES IN CIVIL CASES

Proposals in the Bill

426. Part 3 of the Bill contains various provisions about the use of special measures in civil cases.

427. Special measures are a range of practical steps aimed at making it easier for vulnerable witnesses to give their evidence to a court or vulnerable parties to appear at court hearings (e.g. by video link outside the court room or from behind a screen in the court).

428. At present, there are two key pieces of legislation relating to special measures in civil cases. Part 2 of the Vulnerable Witnesses (Scotland) Act 2004 ('the 2004 Act') introduced the original legislative scheme for special measures in civil cases in Scotland. For certain family cases, the Children (Scotland) Act 2020 ('the 2020 Act'), sections 4-8 (not yet in force) would make changes to the 2004 Act.

429. The Policy Memorandum states that the provisions in the Bill on special measures in civil cases are in line with the general aims of the Bill to improve the justice system for people who have suffered trauma. Trauma can be experienced in civil as well as criminal cases. For example, civil cases can involve individuals who have suffered domestic abuse.

430. The legislation covering this policy area is complex and we would refer to the SPICe briefing on the Bill and the Policy Memorandum for a full explanation.

431. Part 3 of the Bill would take the special measures regime for certain family cases under the 2020 Act and apply it to (most) civil cases. □ey features of Part 3 include—

- Certain categories of witness in a civil case would be deemed vulnerable, although special measures would still not be automatic for such witnesses (section 30)

- A new special measure, which prohibits a litigant from conducting their case personally, as opposed to being represented by a solicitor. There is a presumption that this will apply in certain circumstances (sections 31 and 32)

- The possibility of special measures in 'non-evidential hearings', i.e., court hearings other than where evidence is being taken and witnesses are cross-examined on it (section 33).

432. Section 33 of the Bill would repeal amendments made by the 2020 Act and substitutes provisions extending the availability of special measures in non-evidential hearings to civil cases generally.

433. According to the Policy Memorandum—

> "The expansion of the availability of special measures will benefit vulnerable parties involved in non-evidential hearings with the aim of reducing any undue trauma."

434. Section 30 amends section 11B of the 2004 Act, which, in turn, was added by the 2020 Act. Section 11B will require civil courts to treat certain witnesses as vulnerable if a) there is a civil protection order such as an interdict or non-harassment order in place to protect them from abuse by a party to the proceedings, or b) if the witness is the victim, or alleged victim, of "a relevant offence" (including a sexual offence or offence relating to domestic abuse) for which a party to the proceedings is being prosecuted or has been convicted.

435. Section 31 of the Bill makes provision so that the courts can prohibit a person conducting their own civil case and carrying out personal cross-examination. According to the Policy Memorandum—

> "The key policy aim is to protect persons who have suffered abuse, such as domestic abuse, from being cross-examined by their abuser."

436. Section 32 will establish a register of solicitors who may be appointed by the court to act for a person when that person has been prohibited from representing themselves and has not taken steps to appoint a solicitor. This register will be maintained by the Scottish Ministers although the Scottish Ministers could confer the duty of maintaining the register on another body.

Views on Part 3

437. The Committee received several comments on the provisions in Part 3 of the Bill. We will discuss the main points raised below.

Definition of vulnerable witnesses

438. Some organisations proposed that the scope of those witnesses who are 'deemed vulnerable' for the purpose of access to special measures in civil cases should be broadened.

439. A written submission from Rape Crisis Scotland noted that in criminal cases the definition of witnesses who are deemed to be vulnerable include under 18s and where the proceedings relate to sexual offending, trafficking, domestic abuse, stalking, or if there is a 'significant risk of harm' to the person by them giving evidence.

440. As we have noted, under the Bill, in civil cases the courts can only deem a witness vulnerable if a civil protection order such as an interdict is in place to protect them from abuse by a party to the proceedings, or if the witness is the victim, or alleged victim, of an offence for which a party to the proceedings is being prosecuted or has been convicted.

441. The submission from Rape Crisis Scotland argued that—

> "We believe that the provisions for special measures in civil cases should be strengthened beyond that which is incorporated within the Bill. We feel that the provision of special measures in civil cases should be more in line with those in the criminal justice system."

442. The submission from Rape Crisis Scotland argued that witnesses in civil cases should be deemed vulnerable where the civil proceedings incorporate assertions of rape or sexual violence.

443. Dr Marsha Scott from Scottish Women's Aid told us—

> "I find it gobsmacking, to be frank, that a woman can be offered certain protections in a criminal case and then wind up with almost the same set of actors in a civil case and be confronted by her perpetrator or find herself in a whole variety of situations"

444. Victim Support Scotland made the point in its written submission that under the proposals in the Bill, a woman experiencing domestic abuse would need to have reported the abuse and seen it go through criminal proceedings before being deemed as vulnerable. The submission noted that "it does not believe this is trauma-informed and is concerned that it will fail to fulfil the policy objective which is to protect victims of abuse in civil proceedings".

445. Bill Scott from Inclusion Scotland told us—

> "I echo some of the concerns that Victim Support Scotland and Rape Crisis Scotland have raised. A conviction should not be needed in order for special measures to be adopted."

446. The written submission from the Sheriff and Summary Sheriffs' Association also commented on the definition of a vulnerable witness. It noted that the definition of a vulnerable party in section 33 is a party who would be deemed a vulnerable witness by virtue of section 11B of the 2020 Act. It commented that—

> "The provision is applicable only in circumstances where that party gives evidence. S11B effectively identifies a vulnerable party as one in relation to whom where there is in force a non-harassment order, interdict or similar remedy or where there is either a conviction or a prosecution for any of the offences listed in S11B (5) of the 2020 Act."

447. The written submission from the Sheriff and Summary Sheriffs' Association goes on to state that—

> "The Bill does not re-visit this definition. There is an argument that a broader definition (such as where there are ongoing civil proceedings between the parties in which protective remedies are sought/domestic abuse is averred) should be considered. This would better fit with the policy intention of the Bill."

Automatic entitlement to special measures

448. In civil cases, under the Vulnerable Witnesses (Scotland) Act 2004, no category of adult witness is automatically treated as vulnerable. A person must satisfy a statutory test as to whether they get special measures in an individual case.

449. Neither the 2020 Act nor the Bill changes this requirement.

450. We also heard some comments about this situation. For example, Dr Marsha Scott from Scottish Women's Aid told us—

> "we would really like to see the same availability and requirements on courts for special measures. At the very least, for any victim who is involved in a domestic abuse case, access to those special measures should be automatic and should not rely on the decision of the sheriff."

451. Several other organisations including Rape Crisis Scotland and Victim Support Scotland argued that being deemed vulnerable should result in an automatic entitlement to special measures.

452. Jamie Foulis from the Family Law Association cautioned, however, that—

> "My hesitation about them being automatic is that there must always be a discretion available to the decision maker, whether that be sheriff or judge, to ensure that the measures that are in place do not prejudice the rights of the other party to the proceedings."

453. Stuart Munro of the Law Society of Scotland also made the point that when a court decides what a witness's deemed vulnerable status should mean in terms of how they should give evidence, it should take into account the witness's views.

454. We have already highlighted in our discussion on Part 2 of the Bill the importance of respecting the wishes of individuals when it comes to the application of special measures.

455. The Cabinet Secretary commented on the approach taken in the Bill—

> "Our approach thus far has been that where civil protection orders are in place—an interdict or a non-harassment order—or where there are convictions or, indeed, live proceedings, those will trigger the special measures automatically. The court would have discretion in other circumstances. I am always happy to discuss and consider further. I am also aware of evidence that the committee got from the Family Law Association that expressed some caution."

Availability of special measures under current legislation

456. We also heard some comments that even if an individual is entitled to special measures, at present there can be inconsistencies in their availability.

457. Dr Louise Hill of Children 1st commented—

> "I do not want to use the words "postcode lottery", but we find that there is a real mix, even on the day, with regard to what children experience and which special measures might be in place."

458. She pointed out that "there is a lot of legislation for victims but we are very concerned that much of the legislation that should make a difference for child victims remains unimplemented".

459. For example, Dr Hill commented on research Children 1st undertook with the University of Edinburgh in 2023 which studied two police divisions and four local authorities in the North Strathclyde Sheriffdom but did not find children giving pre-recorded evidence as provided for in the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019.

460. Dr Hill noted that with this Bill, "we would be extending to civil courts provisions that there should be in criminal courts, but we do not yet see those provisions in criminal courts". She commented that "one of the challenges is that a huge amount of energy goes into the legislative process and that, I would say, less resource and energy go into implementation".

461. Stuart Munro of the Law Society of Scotland told us "there are undoubtedly variable levels of facilities in our sheriff courts around the country" and noted "there are pressures in the system that are brought about by resourcing".

462. The written submission from the Scottish Courts and Tribunals Service noted the Financial Memorandum contains an indication of the potential volume of cases to which special measures may apply if Part 3 of the Bill was implemented. However, the submission suggested that the number of cases have the potential to be substantially higher which will impact on resources.

463. David Fraser from the Scottish Courts and Tribunals Service told us there was a need to get technology in civil courts up to the same standard to allow a uniform approach to be taken irrespective of whether civil or criminal business is being heard.

Existing legislation

464. Another point which was raised in evidence was that certain provisions relating to special measures in the Children (Scotland) Act 2020 have not yet come into force.

465. The written submission from Children 1st commented that Part 3 of the Bill—

> "…seeks to extend sections of the Children (Scotland) Act 2020 that are not yet in force meaning layers of unimplemented legislation are now building on top of each other

466. A written submission from the National Society for the Prevention of Cruelty to Children (NSPCC) argued that "there should be a review of the backlog of legislation passed but not yet enacted and its impact".

467. The Policy Memorandum notes that section 33 of the Bill repeals amendments made by the 2020 Act and substitutes provisions extending the availability of special

measures in non-evidential hearings to civil cases generally. The Policy Memorandum went on to state—

> "The 2020 Act was largely about child contact and residence cases and children's hearings and so the provisions in the 2020 Act on special measures related to these areas. This Bill is an opportunity to extend special measures to civil cases generally and ensure consistency for all those who are vulnerable who may benefit from use of special measures."

468. The Cabinet Secretary explained the reasons why elements of the Children (Scotland) Act 2020 had not yet come into force. She commented—

> "The implementation of that legislation was interrupted by the pandemic and, in the meantime, we have introduced a bill that will put more extensive protections in place in the civil system. The legislation that you are referring to was pretty bespoke and was introduced to deal with certain family cases. The bill will deliver more—indeed, my focus is on delivering more with maximum impact."

469. She went on to explain—

> "There is a good synergy between the 2020 act and this bill, in that we are essentially increasing the safeguards for vulnerable parties. Section 11 of the 2020 act contains special measures that are focused on family cases involving custody and disputes about contact. In this bill, we are taking the nub of that element and expanding it to cover civil procedures more widely. That is to be welcomed—it is what victims have been calling for."

470. The Cabinet Secretary acknowledged the existence of concerns about the time that can be taken to implement primary legislation. She wrote to the Committee with an update on the implementation of previously passed legislation relating to special measures, victim and witness support and trauma-informed practice.[14]

471. In respect of the timescales for implementing Part 3 of the Bill, she commented that "…we are probably looking at around two years. I put that on the record now".

Single sheriff model

472. Another issue which the Committee discussed was whether a model in which a single sheriff heard evidence on both criminal and civil cases might prevent instances of the accused using court proceedings to inflict additional harm on victims by prolonging the justice process.

473. Dr Marsha Scott of Scottish Women's Aid commented—

> "We recommend it, and I would love to have it in the bill. It would probably have to go in as a pilot, because we would need to test it at a small scale. Every sheriff I have spoken to thought it was a good idea. It might be a miracle if there was not a lot of opposition on the part of the system."

[14] Letter from the Cabinet Secretary for Justice and Home Affairs on the Victims, Witnesses and Justice Reform Bill. (parliament.scot)

474. We note that the Bill does not contain any provisions about a 'single sheriff' model for criminal and civil cases. The Cabinet Secretary was asked about the suggestion. She told us—

> "It would be a major and substantive piece of work—I am just being up front and direct about that. That does not mean that there is no merit in exploring it, but it might limit what could be achieved via an amendment....
>
> We are planning some workshops to look at the issue more fully. There is not the fullest of evidence.... We will continue to look at the issue with our stakeholders in the workshops, which will take place next year."

Register of solicitors

475. As we have discussed, the Bill makes provision so that the courts can prohibit a person conducting their own civil case and carrying out personal cross-examination.

476. Section 32 establishes a register of solicitors who may be appointed by the court to act for a person when that person has been prohibited from representing themselves and has not taken steps to appoint a solicitor.

477. We heard from representatives of the legal profession that they supported, in principle, the creation of such a register. However, they argued that more detail needed to be provided about how it would work in practice.

478. The written submission from the Law Society of Scotland highlighted questions around how the register will operate□who will administer the register□what criteria will be required for inclusion□whether the register will be for civil cases generally, or sub-divided into categories of work, and how solicitors will be paid for this work.

479. One concern was about the arrangements for remuneration and whether the resources provided would attract a sufficient number of solicitors willing to be included on the register.

480. The written submission from the Faculty of Advocates commented—

> "The provisions leave regulation of the register (including training and qualification requirements) and matters of remuneration to the Scottish Ministers. Faculty would welcome further information as to the Government's intentions in this regard."

481. The written submission from the Senators of the College of Justice commented—

> "We observe only that in the absence of certainty of remuneration, it may prove difficult to attract applicants for inclusion on the Register."

482. A written submission from the NSPCC argued that it is critical that solicitors acting for parties prohibited from representing themselves in cases involving child victims and witnesses have had sufficient training on specific areas such as child development, infant mental health and the impact of trauma on children.

483. The Cabinet Secretary indicated that the creation of a register of solicitors would require detailed work, including regulations and consultation. She noted—

> "That piece of work underpins the policy drive, with regard to special measures, to insert circumstances to prevent people from representing themselves or leading their case in the civil courts."

Conclusions and recommendations

484. We welcome the policy objective of Part 3 of the Bill which is to expand the availability of special measures in civil cases. We acknowledge that trauma can occur in civil cases as it can in criminal cases and so it is appropriate that this is addressed in the Bill.

485. However, we have some comments about the way the Bill proposes to do this.

486. First, we note that some of the existing legislation relating to special measures in civil cases has not yet come into force, for example certain provisions in the Children (Scotland) Act 2020. Some organisations have identified backlogs of legislation in this policy area which has been passed by Parliament but not yet enacted. We are concerned about this position, given that Parliament is now being asked to agree more legislation in this area. The Cabinet Secretary's explanation is that the COVID-19 pandemic interrupted implementation of the 2020 Act and, in the meantime, expanded measures are now being taken forward in this Bill. While we note this explanation, we recommend that the Scottish Government sets out a clear timetable for the implementation of the various provisions in Part 3 of the Bill.

487. Second, we heard that even if a person has a right to special measures at present, in practice there can be inconsistencies in their availability. We would be concerned if Parliament was in a position where it legislated to give expanded rights to special measures, but in practice it was not always possible to take up these additional rights. It is clear to us that providing sufficient resources will be key to a successful implementation of the proposals in Part 3 of the Bill.

488. Third, we note the calls to broaden the scope of those witnesses who are 'deemed vulnerable' for the purpose of access to special measures in civil cases. At present the definition is more tightly drawn than in criminal cases. For example, we heard evidence that under Part 3 of the Bill women experiencing domestic abuse are often offered certain protections in a criminal case that may not be offered in civil proceedings despite involving the same individuals. Furthermore, under the Vulnerable Witnesses (Scotland) Act 2004, no category of adult witness is automatically treated as vulnerable. A person must satisfy a statutory test on a decision of the court.

489. We understand that there are differences in the legislation governing civil and criminal cases. However, we have concerns that some of the restrictions

on accessing special measures in civil cases which we have discussed do not reflect the trauma response approach the Bill sets out to achieve. We ask the Scottish Government for its response to the concerns we have heard.

490. Fourth, we note the proposal in the Bill to establish a register of solicitors who may be appointed by the court to act for a person when that person has been prohibited from representing themselves in court. We are supportive of this proposal, however we heard a number of questions about how it would work in practice, including who will administer the register and what criteria will be required for inclusion. We appreciate that work is ongoing, but it does not seem satisfactory that so many basic details are unknown at a time that Parliament is being asked to scrutinise the Bill. We ask the Cabinet Secretary to address these deficiencies before stage 3.

491. Finally, we note that the Scottish Government is planning to undertake some workshops on a 'single sheriff' model for criminal and civil cases. We look forward to receiving an update on this work.

PART 4: CRIMINAL JURIES AND VERDICTS

Proposals in the Bill

492. In the Scottish criminal justice system, there are three possible verdicts (guilty, not guilty and not proven)□two of which result in the acquittal of the accused (not guilty and not proven).

493. Sections 35 and 36 of the Bill would remove the not proven verdict in criminal cases in both summary and solemn proceedings.

494. It is important to note that, although much of the debate on the merits of the not proven verdict has focused on its use in sexual offences, the proposals in the Bill would apply to all criminal cases.

495. The Policy Memorandum sets out the Scottish Government's case for abolishing the not proven verdict—

> "The Scottish Government considers the evidence overwhelming: that the existence of a verdict that people do not understand, that can stigmatise the acquitted and may cause additional trauma to victims, does not serve the interests of justice or the people of Scotland."

496. However, the Policy Memorandum goes on to state that the Scottish jury system is a "complex inter-related system" and so "verdicts must be considered alongside the other key aspects of jury size and majority".

497. The Scottish Government concludes in the Policy Memorandum—

> "The Scottish Government has also noted key research supporting a view that jurors may be more likely to convict in a system with two verdicts of guilty and not guilty. This includes the 2019 Scottish jury research. If there is any possibility that more guilty verdicts would arise from the removal of the not proven verdict, it is important to demonstrate that such convictions are safe and result from a balanced and fair justice system."

498. The Policy Memorandum reaches the following conclusion—

> "Following careful consideration of the evidence, the Scottish Government considers that removal of the not proven verdict cannot proceed as standalone reform if balance in the system is to be protected. Accordingly, the Bill proposes changes to the jury size and seeks to increase the majority required for conviction."

499. The specific changes proposed in the Bill to the jury size and majorities for conviction are as follows.

- A jury would be formed with 12 jurors (as opposed to 15 at present). This number could be reduced if one or more jurors were discharged during the trial (e.g. due to illness) but the jury would need to retain at least nine members to continue hearing the case.

- A jury would return a verdict of guilty where—

  - in the case of a jury consisting of 11 or 12 jurors, at least eight favour a guilty verdict
  - in the case of a jury consisting of nine or 10 jurors, at least seven favour a guilty verdict.

- Where a guilty verdict does not attract the above level of support, the jury must return a verdict of not guilty. Similar to the current situation, there is no potential for a hung jury (i.e. the only possible outcomes are guilty or not guilty).

Scottish jury research and other data

500. The Scottish Government has cited the Scottish jury research in support of its proposal to abolish the not proven verdict and the associated jury reforms to bring balance to the system.

501. The research was commissioned by the Scottish Government and used mock juries to examine how criminal juries reach decisions, with a report published in 2019.

502. The report explained the methodology behind the research—

> "The study was the largest of its kind ever undertaken in the UK, involving 64 mock juries and 969 individual participants. The research team staged jury deliberations between May and September 2018, in venues in central Glasgow and Edinburgh. Jurors were recruited to be broadly representative of the Scottish population eligible for jury service in terms of gender, age, education and working status.
>
> In order to assess the effect of the Scottish jury system's unique features on decision-making, juries varied in terms of the number of verdicts available to them (two or three), jury size (12 or 15) and the size of majority they were required to reach (simple majority or unanimity).
>
> Each jury watched a video of a fictional but realistic Scottish trial (either a mock rape trial or a mock assault trial) lasting approximately one hour. Jurors completed a brief questionnaire recording their initial views on the verdict, before deliberating as a group for up to 90 minutes and returning a verdict (if the jury had been able to arrive at one). After returning their verdict, jurors completed a final questionnaire covering their beliefs about the not proven verdict and views about the deliberation process, as well as their final views on the verdict. Both mock trials were deliberately finely balanced, in order to encourage debate about

guilt and acquittal, and to maximise the likelihood that jurors would consider the difference between the not guilty and not proven verdicts."

Comments on research

503. We do not consider it is our role to critique the methodology of individual pieces of research in the field of studying the behaviour of juries.

504. However, we note that there has been some discussion about the methodology used in the Scottish jury research, notably the use of mock jurors—

505. Ronnie Renucci □C of the Faculty of Advocates commented that—

"Data and research with real jurors is available, but there is none in Scotland. I, too, appreciate that those who carried out the research had their hands tied behind their backs. They could not speak to real jurors. That is why we have research on mock juries. Even then, if we are to apply research involving mock juries, our criticism is that it was not substantial enough."

506. He contrasted the use of mock juries with the research undertaken by Professor Cheryl Thomas of University College London in England which involved interviews with people who had served on juries. Ronnie Renucci □C explained his position as follows—

"My view is that we should not change our whole legal system based on research with mock juries, which, in no way, mirrored what happens in courts."

507. He noted, for example, that the mock trial in the Scottish jury research lasted one hour, whereas in his career he had never experienced a rape trial which had lasted less than a day.

508. Ronnie Renucci KC acknowledged that Professor Cheryl Thomas's research did not specifically cover the not proven verdict, but he commented that he—

"was simply pointing out that there is real research out there, involving real juries, that gives an indication of how juries think and what juries do once they get into that jury room. That is obviously something that we know absolutely nothing about."

509. We questioned the authors of the Scottish Jury research on the methodology which had been used. Professor Fiona Leverick of the University of Glasgow explained that—

"The situation was made as realistic as it could be□I do not think that we could have done anything else to make it more realistic."

510. Professor Fiona Leverick felt that "the way that our jurors talked about the verdict and their understanding of it is not going to be different from how real jurors would talk about and understand it".

511. However, Professor Leverick was also clear with us about what the research could, and could not, tell us about the behaviour of jurors. We will go on to discuss this.

512. The Contempt of Court Act 1981 states that it is contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

513. We have already noted that there has been some debate as to whether, and if so to what extent, it is possible to conduct research with real jurors in Scotland under current legislation.

514. Professor James Chalmers of the University of Glasgow commented on the position—

> "There are limitations on speaking to real jurors. Some very limited research, using surveys of jurors' experiences at court, was done in Scotland some time ago, but that is not relevant to this discussion. □ou cannot ask jurors about the content of their deliberations: that is prohibited. As Professor Thomas notes, there are limits to what conclusions you can take from the answers that jurors give to any questions. Any research in the area would require legislative reform to enable those specific questions to be asked."

Availability of data

515. A related issue we faced was the lack of availability of data on the outcome of jury decisions and in particular how the jury may have split when delivering a majority verdict.

516. This is relevant to our consideration of Part 4 of the Bill because changes are being proposed to the majority required for conviction.

517. Alisdair Macleod from the Crown Office and Procurator Fiscal Service commented—

> "It might well be that every jury in the land comes back with a unanimous 15 to nil verdict or a 14 to one majority verdict. There is no way of knowing how many cases are decided on an eight to seven verdict"

518. Alastair Bowden, a Scottish Government official who gave evidence alongside the Cabinet Secretary, explained that it is not necessary to collect this data because the current system is only concerned with the outcome of the jury's decision. He also noted that if the data was published this could affect public confidence in the outcome of trials, for example if there was a narrow conviction or acquittal.

519. Alastair Bowden also made the point that the availability of the data might not take us much further forward in understanding how particular changes proposed in the Bill might impact on verdicts. He commented that what the jury does in the current system would not be a reliable guide as to what they would do if directed differently under a different system.

520. As a Committee, our position is that we are required to assess the merits of the policy objectives of the Bill with reference to the research that is currently available, including that cited by the Scottish Government in support of its position.

Views on the not proven verdict

521. The Committee heard a range of views about the merits or otherwise of the proposal to abolish the not proven verdict.

522. The Policy Memorandum argued that the evidence to support abolition was "overwhelming" and that it would "improve the fairness, clarity and transparency of the framework within which the courts make decisions in criminal cases".

523. The Policy Memorandum listed some of the reasons in support of the abolition of the not proven verdict—

> "…it is also often said that the existence of the not proven verdict encourages jurors to avoid the proper discharge of their functions (by allowing them to 'sit on the fence'), that it may cause additional trauma to complainers, that it is confusing and that the lack of legal definition for the verdict is undesirable in a criminal justice system where jurors should be able to make their decisions with certainty as to what those decisions mean."

524. The Cabinet Secretary told us—

> "The Scottish Government firmly believes that our law and legal processes must meet the needs of modern 21st century Scotland. Clearer and more transparent decision making is an important part of that."

525. It is important to note that the Scottish Government says it is not proposing to abolish the not proven verdict in order to increase convictions. Indeed, the proposed additional jury reforms are designed to 'balance' the anticipated impact of the abolition of not proven verdict on convictions.

526. The views we received on the not proven verdict can be grouped into several broad themes, which are set out as follows.

Clarity

527. The Committee heard evidence that there is a lack of clarity regarding what the not proven verdict means.

528. The Policy Memorandum explains the legal position as to the meaning of not proven, as understood by the Scottish Government. In summary—

> "There is nothing in legislation or case law to define the not proven verdict and no generally accepted legal definition. Similarly, there is nothing in law which defines the difference between the not proven and not guilty verdicts… Jurors… receive no instruction on the meaning of the not proven verdict or how it differs from not guilty…"

529. Several witnesses pointed out that the Jury Manual, produced by the Judicial Institute for Scotland to provide guidance to the judiciary, states—

> "It is dangerous to attempt to explain any difference between the not proven and not guilty verdicts."

530. Professor Fiona Leverick told us that there was no universal understanding among the jurors in the Scottish Jury research mock trials about what the not proven verdict meant. She referred to them 'projecting' different (and varied) meanings onto the verdict, which included—

- It should be used if they thought that the accused was guilty, but they were not absolutely sure about it
- It should be used when they were just not sure at all
- It was a compromise verdict, used collectively when the jury was finding it difficult to agree, and it was split between conviction and acquittal

531. Professor Leverick also noted that some jurors in the mock trials used the not proven verdict to send a distinct message. Some intended to send a message to the accused that they believed they committed the offence even if there was not enough evidence for conviction. Others wanted to indicate to the complainer, particularly in rape cases, that their account was believed.

532. Eamon □eane of the University of Glasgow, who gave evidence along with Professor Leverick, also noted that in reaching a not proven verdict some jurors may simply have followed the directions they had been given and had felt that the Crown had not proven its case beyond a reasonable doubt.

533. Sandy Brindley of Rape Crisis Scotland expressed concern about the lack of clarity associated with a not proven verdict. She commented—

> "Fundamentally, it is not correct to have a verdict that cannot be explained."

534. Joe Duffy, who has campaigned for over 30 years to end the not proven verdict, commented in his evidence to us that there was a view that the lack of clarity "gives it a bit of mystique" but he felt this was "a piece of nonsense".

535. Witness 1 told us that she had been misinformed about what the not proven verdict meant in her case—

> "We went through the process and were told that the verdict meant that we were believed, but there was not the evidence to convict him. That was what I was told on the phone. That is not true, and it took me to look into that and to go through the process."

536. Some witnesses suggested that the lack of clarity as to the meaning of the not proven verdict could be used by defence lawyers to their advantage. Joe Duffy expanded on this point—

> "If you listen to the defence counsel at any trial, they will labour one word throughout all the evidence. They do not ask whether the person is guilty or not

> guilty or whether they have convinced the jury they will continually use the word "proven". Then they will say that if the case has not been proven, the verdict must be not proven. They do not say "guilty" or "not guilty"."

537. Hannah Stakes also suggested that defence lawyers could use the not proven verdict to their advantage as they had, in her view, two chances at acquittal—

> "The situation is very imbalanced. If they think that they will not get a not guilty verdict, they focus on not proven."

538. This view was echoed by individuals we spoke to informally, who had had a close family member lose their life because of a serious crime. Their view was that accused persons in serious criminal cases have an unfair advantage as there are two verdicts to acquit.

539. We asked the representatives of the legal profession who gave evidence to the Committee how they would define the not proven verdict.

540. Ronnie Renucci QC of the Faculty of Advocates commented that "we do not know what the definition of not proven is, but there must be a difference". He elaborated—

> "It stands to reason that there must be a difference if some juries return verdicts of guilty, some return verdicts of not guilty and some return verdicts of not proven. There must be a difference, but we do not know what that difference is."

541. Stuart Munro of the Law Society of Scotland described it as being "a matter of emphasis", with juries indicating their view of the evidence as a whole by selecting between not proven and not guilty. He noted that it was perhaps an indication that is given by a jury that it is uncertain about a case.

542. Ronnie Renucci KC also referred to the verdict as being "a matter of emphasis". He noted that it may be that members of the jury are not convinced of the accused's innocence, but the Crown has failed to meet the standard of proof beyond a reasonable doubt. Both Ronnie Renucci QC and Stuart Munro of the Law Society of Scotland pointed out that the meeting of this standard of proof is the focus in a trial. There is no requirement on the defence to prove that a person is not guilty.

Wrongful convictions

543. Several representatives of the legal profession highlighted the 'safeguarding' role of the not proven verdict within the current structure of the Scottish jury system helping to prevent wrongful convictions.

544. Stuart Munro of the Law Society of Scotland argued that the retention of the not proven verdict was necessary given the other features of the Scottish system. He told us—

> "…the not proven verdict is one part of a greater whole that operates together to produce what we consider to be a broadly safe system. If one part of that whole, such as the not proven verdict, were to be taken away, the system would be put out of kilter, and other changes would have to be made in order to compensate, as it were, for that change."

545. This view was echoed by Ronnie Renucci □C of the Faculty of Advocates who told us—

> "I think that we have the only criminal jurisdiction in which someone can be convicted of a charge of murder, for example, by a majority of one. In some ways, the three verdicts have therefore provided a safeguard and, if a safeguard is going to be removed, it must be replaced with another."

546. Ronnie Renucci □C noted the possibility that the not proven verdict could be abolished if other 'safeguards' are put in place—

> "The faculty has no difficulty with removing the not proven option if another safeguard is put in its place, but our response is in relation to the current system and where it fits with that. If we are changing and going to a smaller jury size with a different threshold for a majority, there would clearly be no place for a not proven option in that new system."

547. Stuart Murray of the Scottish Solicitors Bar Association argued that the not proven verdict "is essentially a safety valve for jurors" in scenarios in which a jury is not utterly convinced of an accused's innocence but feels that the Crown has failed to prove guilt beyond a reasonable doubt.

548. The legal representatives who gave evidence to the Committee also raised the possibility of wrongful convictions should the not proven verdict be abolished without any further changes being made. Stuart Munro of the Law Society of Scotland told us—

> "It is very hard to predict how many wrongful convictions abolishing the not proven verdict might result in, but that has to be the logical implication of doing so."

549. This view was echoed by Stuart Murray of the Scottish Solicitors Bar Association.

550. Stuart Murray also expressed concern that this change would take place at the same time as other substantial reforms are being proposed in the Bill.

Wrongful acquittals

551. A different perspective on the role of the not proven verdict was provided by Sandy Brindley of Rape Crisis Scotland.

552. Unlike the representatives of the legal profession, she did not view the not proven verdict in terms of a safeguard against the wrongful conviction of the accused within a unique Scottish system.

553. Instead, she commented that the not proven verdict is used disproportionately in rape cases and argued that it could be contributing to wrongful acquittals. She commented—

> "We have seen some absolutely terrible cases in which there has been a not proven verdict—terrible in the sense that, to me, the evidence seemed absolutely

> overwhelming, including cases in which there has been significant physical injury—and the jury's decision has been inexplicable."

554. Sandy Brindley referred to similar comments made by members of the judiciary in the report 'Improving the Management of Sexual Offence Cases'.

555. However, she did not think there would be a significant rise in the number of convictions if the not proven verdict was abolished, commenting—

> "I think that the impact would be minimal, as it would have an effect in only a handful of cases. It is the right thing to do, but it will not have a huge impact on conviction rates."

Impact of a not proven verdict on complainers and the accused

556. The Committee heard from witnesses about the impact which a not proven verdict could have on both the complainer in a case, and on the accused standing trial for an offence.

557. We heard personal testimony about the negative impact which the verdict can have.

558. Joe Duffy told us of the traumatic impact the not proven verdict delivered by the jury in the case of the man accused of murdering his daughter Amanda had on him and his family. He told us—

> "The verdict leaves people traumatised. We deal with murder victims' families. I am talking from a personal viewpoint, and I can tell members that the verdict leaves people further traumatised, because it is a complete anomaly that should not be there."

559. We also heard about research conducted by Professor Vanessa Munro of the University of Warwick into the experience of complainers who had received a not proven verdict in their cases. Sandy Brindley of Rape Crisis Scotland commented that Professor Munro's research found that—

> "Overwhelmingly, they said that it got in the way of their being able to come to terms with the outcome of the court case, because they were left with nothing and with no way of understanding it."

560. The complainers in Professor Munro's research also expressed concern that the not proven verdict had allowed the jury the option of an 'easy way out' that avoided discussing the case more fully and engaging in difficult decision-making.

561. Sandy Brindley of Rape Crisis Scotland told us that, based on her experience—

> "A small number of survivors have said to us, "at least it wasn't 'not guilty'" and that it felt as though the jury was communicating some degree of belief. However, the majority of survivors that we have been in contact with are absolutely supportive of the removal of the not proven verdict."

562. Witness 1, who heard a not proven verdict delivered at her criminal trial, commented—

> "When you speak to the accused or to complainants, you find that neither of them like the not proven verdict. No one wants to be left with a not proven—they would rather have not guilty. We come from a place where we do not want to have a not proven, because it sort of puts the inference on us."

563. Hannah Stakes described how she felt when the accused in her case received a not proven verdict—

> "After three years, at the end of the trial, I was just left. I heard the not proven verdict, and then I walked out of the courtroom and that was it. There was no reason given for the decision, no follow-up and no contact. It was just, "The system has failed you and off you go—make of that what you will."

564. When we spoke informally with individuals who had a close family member lose their life because of a serious crime, they noted that a victim or their family may only learn about the possibility of a not proven verdict when it is handed down by a jury in a trial and this can leave them confused and shocked.

565. Stuart Munro of the Law Society of Scotland noted that in some limited cases a not proven verdict can be positive for complainers as they might feel the jury did not think they were lying. However, he acknowledged that "equally, in some respects, it is unsatisfactory".

566. A written submission from Edinburgh Rape Crisis Centre noted that not every survivor has the same experience of receiving a not proven verdict in their case. The submission commented—

> "We have supported a number of survivors for whom receiving a not proven verdict felt more satisfactory than receiving a not guilty verdict - 'not proven' made them feel believed by the jury, despite the absence of proof beyond all reasonable doubt."

567. Stuart Munro of the Law Society of Scotland noted the potential impact on the accused of receiving a not proven verdict. He commented that—

> "The truly innocent accused might feel that they did not get a fair verdict if the outcome is not proven rather than not guilty. However, fundamentally, from a legal point of view, not proven means exactly the same as not guilty."

568. Ronnie Renucci □C of the Faculty of Advocates noted that if independent legal representation was available to complainers in rape cases, this might assist them with understanding the implications of a not proven verdict, namely that the Crown had failed to convince the jury beyond a reasonable doubt that the crime of rape had been committed. He commented —

> "In some ways, a not proven verdict could be a comfort to complainers, but I do not think that it has been explained to them."

569. The Cabinet Secretary noted that—

> "…many people do not trust a verdict that cannot be adequately explained. It causes trauma to victims and can leave the accused with lingering stigma."

Public confidence

570. We heard from Professor Fiona Leverick of the University of Glasgow that maintaining public confidence in the criminal justice system is an important consideration when considering the case for abolishing the not proven verdict. She noted—

> "We should ensure that juries treat the process of reaching a decision with the seriousness and the diligence that it deserves. The availability of the not proven verdict means that there is a risk that they might not do that, if that makes sense."

571. Her colleague Eamon Keane made a similar point, arguing that "public confidence in the criminal justice system is absolutely key" for both the accused and complainers.

Uniqueness of the not proven verdict

572. Several written submissions argued that the not proven verdict should be retained on the grounds that it is a unique part the Scottish judicial system which Scotland should be proud of. Furthermore, some argued that its abolition would represent an unjustified break from centuries of history.

573. Eamon □eane of the University of Glasgow provided the Committee with a useful summary of the history of the not proven verdict.

574. He explained that "there is a strong attachment to that feature of Scots law because it is unique and it is Scottish".

575. However, he noted that "in essence, the original verdicts in Scots law were guilty and not guilty—perhaps slightly different language was used for them, given the type of English that was spoken in Scotland at the time". The not proven verdict developed over time in the period following the 16th and 17th centuries in a complicated set of legal developments.

576. His colleague, Professor Fiona Leverick, summarised the position as follows—

> "The not proven verdict was not introduced to the system as a matter of design and it is not some great, genius Scottish idea—it is nothing more than a historical accident. Whatever the reasons might be for keeping it or getting rid of it, it being some sort of original, Scottish great idea is not one of them."

577. The Cabinet Secretary gave her views on the history of the not proven verdict, telling us—

> "We are all rightly proud of our unique Scottish justice system, but it is important to stress that our system has always evolved and learned from others over the centuries and that no part of our justice system is exempt from examination or, indeed, change."

Changes to jury size and majorities

578. As we have discussed, the Policy Memorandum discusses the need to protect the "balance in the system".

579. The Cabinet Secretary told us—

> "It is important to stress that the jury reforms are not about increasing or decreasing conviction rates…"

580. As we understand it, the Scottish Government's position is that abolishing the not proven verdict will make convictions more likely, and so it is necessary to 'balance' this change with other changes which will make convictions less likely. Specifically, these are the changes to juries proposed in Part 4.

581. We consider it is important to examine the strength of the evidence about the likely impact of abolishing the not proven verdict on conviction rates. This, in turn, will allow us to assess whether the Scottish Government's proposed 'balancing' changes to jury size and majorities are appropriate.

582. We note that the task of understanding the potential impact of abolishing the not proven verdict has been made more difficult by recent developments which have the potential to impact on jury decisions.

583. In September 2023, jury directions were updated to include guidance on rape myths. In addition, in October 2023, a judgment from the High Court of Justiciary Appeal Court clarified the requirements in relation to corroboration.[15] Both these developments took place after the Scottish jury research was conducted, and after the Bill was introduced. It is too early, therefore, to determine what impacts, if any, they may have on conviction rates.

Scottish jury research

584. Professor Leverick told us about what the Scottish jury research could, and could not, say about the impact of the abolition of the not proven verdict on conviction rates—

> "We simply cannot say from our research that, if we took away the not proven verdict, we would get □ more convictions, but I think that we can say that if we did take it away, we know what the direction of travel would be."

585. Professor Leverick summarised the findings as follows—

- "If you take away the not proven verdict, that pushes the system a little bit more towards—if I can use this phrase—being a little bit more conviction-y."

[15] Opinion of the High Court of Justiciary Appeal Court delivered in the Lord Advocate's Reference No. 1 of 2023 □2023□HCJAC 40 (following the High Court decision in the case of Smith v Lees 1997 JC 73).

- "If you change the numbers on the jury from 15 to 12, that pushes the system, after deliberation, a little bit more towards being a bit less conviction-y."

- "If you change the simple majority verdict and have a qualified majority requirement—or even a unanimity requirement, which I appreciate is not what is in the bill—that will push the system more towards acquittal."

586. She went on to say—

> "We cannot tell the magnitude of the changes, but those factors are pushing in different directions. If you change one aspect, you will probably have to think about the other two."

587. The written submission from Professor Leverick and her academic colleagues further commented—

> "Given proposals elsewhere in the Bill to abolish not proven and reduce jury size, without parallel reform to the jury majority requirement, this would have seen the Government proposing the combination of variables identified as most pro-conviction in that research… The policy choice [made by the Government in the Bill] was a difficult one."

588. The submission discussed the implications of particular choices for a majority in a 12-person jury.

589. The submission contended that a 10 out of 12 majority "would run the risk that other reforms targeted, at least in part, at the low conviction rate in sexual offence cases may be thwarted".

590. However, the submission also stated that a majority of 8 on a 12-person jury, which is the proposal in the Bill, "…might be criticised for creating an unacceptable risk of wrongful conviction".

591. Eamon □eane noted that, although an 8 out of 12 majority is a two thirds requirement "no other adversarial common law jurisdiction convicts on the basis of those numbers".

592. Professor Leverick also commented that—

> "We did not test an eight out of 12 system in the jury research, so I have nothing in particular to offer from that research about that use of the numbers, but I feel slightly uncomfortable about eight out of 12. It just feels a little bit too low for a decision that has such magnitude for the accused person.

593. We questioned Professor Leverick on what would be the "ideal" majority if the jury size was 12. She was, perhaps understandably, reluctant to be drawn, but when pressed to express a view told us—

> "I would probably run with a system that has been tried and tested in other nations—not necessarily just England and Wales, because I realise that that has sensitivities. I would want to see the jury strive initially for unanimity, but if it

cannot get there, maybe 10 out of 12 would do. However, that is not a particularly firm view."

594. Her colleague Eamon □eane expressed a similar view.

Views on 'balancing changes' to jury size and majorities

595. The Committee sought other views on the proposals in Part 4 to introduce changes to jury size and majorities in order to achieve the 'balance' the Scottish Government believes is required following the proposed abolition of the not proven verdict.

596. Sandy Brindley of Rape Crisis Scotland commented that at present the not proven verdict is leading to wrongful acquittals. As such, if the verdict was abolished, she felt there would be no requirement for the 'balancing' provisions in Part 4. She told us—

"…it makes no sense to compensate for addressing the potential for wrongful acquittals by making it harder to get a conviction."

597. She elaborated—

"Why would we want to keep the level of convictions in rape cases exactly the same as it is just now, given that—as I think is obvious to anyone—guilty men are regularly walking free?"

598. The Rape Crisis Scotland written submission expressed concern that the overall impact of the provisions in Part 4 of the Bill would be to lower convictions in sexual offence cases.

599. Sandy Brindley told us—

"It is fair to say that a number of rape survivors would see the provisions in the bill as giving with one hand and taking away with the other."

600. Witness 1 expressed a similar sentiment—

"I think that so much good can come from the bill. We just need to be mindful that we don't approve something and then take something away by removing the not proven verdict and then suddenly changing the jury size or something else just to counteract that."

601. However, organisations representing the legal profession offered a different perspective.

602. They emphasised the requirement for balancing provisions to jury sizes and majorities. Ronnie Renucci □C of the Faculty of Advocates commented—

"I recognise that there is no appetite any more for the not proven verdict. Obviously, that is a matter for Parliament, but we stress that, if the not proven verdict is going to be removed, some other safeguard has to be put in its place."

603. The Law Society of Scotland, the Faculty of Advocates and the Scottish Solicitors Bar Association all argued that the Scottish Government should rethink the proposal for a majority of 8 out of 12 on a jury to secure a conviction – arguing for a higher proportion.

604. Stuart Murray of the Scottish Solicitors Bar Association felt that the required research had not been undertaken in order to justify the changes being proposed in the Bill.

605. Stuart Munro of the Law Society of Scotland was asked about his preference in respect of jury majorities, and commented—

> "We are of the view that unanimity or close to it, perhaps something akin to the English model, is what Scotland should be looking at."

606. Ronnie Renucci □C offered a similar view—

> "If we are going to change the numbers, we should be striving for unanimity. In all jurisdictions that operate a jury system of 12, either unanimity or a majority of 10 to two is required. No system falls below 10 to two."

607. Mr Renucci summarised his view as follows: "Strive for unanimity but, if that cannot be achieved, then 10 or 11."

608. Stuart Munro of the Law Society of Scotland pointed to conviction rates in England and commented that "ultimately, it is possible to secure convictions and, indeed, a relatively high rate of convictions under a model that requires unanimity or a majority of 10 to two" on a jury of 12 people.

609. The Committee also took evidence from the Lord Advocate as head of the systems of criminal prosecution in Scotland. She expressed "profound concerns" about the proposals in Part 4 of the Bill.

610. The Lord Advocate urged caution in extrapolating from previous research that the removal of the not proven verdict would require to be balanced by an increase in the majority that is required for a guilty verdict. She told us—

> "We have indicated that it is unclear why the removal of not proven would result in an increase in conviction rates."

611. The Lord Advocate explained further —

> "We think that no logical argument can be made that a properly directed juror who was discharging their oath and who found, after hearing evidence, that a case had not been proven beyond reasonable doubt and returned a not proven verdict in the three-verdict system would, on hearing the same evidence, decide that the case had now been proven and return a guilty verdict in the two-verdict system."

612. The Crown Office and Procurator Fiscal Service written submission referred to three pieces of mock jury research cited in the Policy Memorandum and noted that

the conviction rate where there were two verdicts was lower than that where there were three verdicts.

613. The written submission from the Crown Office and Procurator Fiscal Service stated that—

> "While it is not possible to predict the outcome in any trial, the proposed changes to the jury system may result in an increase in the number of acquittals in cases which would previously have resulted in conviction."

614. The Lord Advocate commented that "the possible changes to the jury size and to the majority are very concerning" and went on to say—

> "To my mind, those changes would make it far more difficult to achieve convictions in the type of cases that we are concerned with. For example, we know that the current conviction rate disguises the very low level of convictions in single-accused, acquaintance-type rape cases. I think that one of the young women who spoke to the committee about her experience said that, even in her case, in which she had a recording of an admission to the offence by the accused, the verdict was only a majority one."

615. In order to address these concerns, the Lord Advocate argued in favour of including provisions for retrials in the Bill in specific circumstances—

> "Given our concerns, and to ensure consistency with other jurisdictions that require unanimity or a qualified majority, there should be provisions for the Crown to seek the authority of the court for a retrial where a majority is not reached. Such provisions are not unknown in Scots law. For example, we have double-jeopardy provisions, and we have the power of the appeal court to order fresh prosecutions."

616. We will discuss the idea of a retrial provision in the Bill later in this report.

617. In its response to the Committee's call for views, the Senators of the College of Justice referred to the response they provided to the Scottish Government's consultation on the not proven verdict. This stated—

> "The majority of the judges agree that if Scotland changes to a two verdict system we should change to require a qualified majority in which two thirds of jurors must agree, namely 10 out of 15, before a verdict of guilty can be returned."

618. Lord Matthews, a Senator of the College of Justice, explained the reason why the Senators had concerns about retaining a simple majority in a two verdict system—

> "The idea that there are two acquittal verdicts has always been seen as the counterbalance to the simple majority. It is debatable whether that is logically right, but, nonetheless, some people will go for not proven as opposed to not guilty.
>
> When they do not have that choice, there is a stark choice between two verdicts. Therefore, if there is a simple majority and one vote either way can swing that, it

might be difficult to say that the case has been proved beyond reasonable doubt when so many people on that jury have found that there is a reasonable doubt or are not satisfied."

619. He went on to say—

"We have said that we want to see a two-thirds majority rather than a simple one. We think that that might relieve the anxiety that any one vote can sway it."

Views of the Scottish Government

620. The Cabinet Secretary cited three strands of research to support her position that abolishing the not proven verdict would increase conviction rates and therefore would need to be balanced by a move away from the possibility of simple majority convictions—

"There is the Scottish jury research—there is a recent meta-analysis—and there are other reports over the past 15 years that show that, if you move from three verdicts to two verdicts, you will increase conviction rates for all crimes."

621. The Cabinet Secretary subsequently wrote to us on 16 February 2024 with more details of the meta-analysis which was published in January 2024[16]. She stated in her letter—

"As with all research, there are limitations with the work and care should be taken when considering the extent to which the findings may be reflected in actual cases. However, the Jackson et al findings are clear across a range of different offences including physical assault, rape and homicide:

—there is a statistically significant effect towards lower conviction rates under the Scottish three-verdict system than under an Anglo-American two-verdict system—"

622. When she gave evidence, the Cabinet Secretary acknowledged that the decision on setting the majority on a 12-person jury at 8 was a matter of judgment. She commented that this "is the part that I will continue to wrestle with most". In her letter to us, she wrote that—

"…these are complex, finely-balanced issues upon which there are a range of views, and the responsibility falls to Parliamentarians to navigate through these to find the most appropriate resolution."

623. In her letter she referenced the concerns expressed by the Lord Advocate and Rape Crisis Scotland that moving to a qualified majority could make it harder to secure convictions, particularly for sexual crimes. She commented that "I take this view very seriously" and that she is very keen that she listen to the full range of views. She stated in her letter—

"As you are aware, the Senators, legal academics, and the defence community argue that to maintain a simple majority in a two verdict system could lead to an

[16] The effect of verdict system on juror decisions: a quantitative meta-analysis (open.ac.uk)

increased risk of miscarriage of justice – the latter two groups suggesting that we should therefore consider setting a higher threshold of ten out of twelve for a conviction.

However, as I said at Committee, independent evidence suggests that moving to two verdicts will lead to an increase in convictions in finely balanced cases."

624. The Policy Memorandum sets out the reasons why the Scottish Government was not proposing to retain a simple majority following the abolition of the not proven verdict. It argued that—

"…it is not considered that this would deliver the appropriate balance in safeguarding the delivery of justice and fairness for all. Any changes to the system would apply to all crimes and offences, so changing the verdicts and majority required would not be an appropriate tool to try and impact the balance for any particular crime. Furthermore, retention of a simple majority with 12-person juries would be unique in countries with common law traditions such as Scotland."

625. The Cabinet Secretary also addressed the question of why the Scottish Government was not proposing a change to require a verdict of unanimity or near unanimity, as is the case in England. She commented—

"There are other safeguards in our system as it stands. Notwithstanding the Lord Advocate's recent successful reference to the appeal court, we still have corroboration as a mainstay of our system. That is one of the reasons why the Government would not support going to near unanimity or unanimity."

Jury size

626. The Committee also heard views specifically on the proposal in the Bill to reduce the size of juries from 15 to 12.

627. As discussed above, the proposal is that this number could be reduced if one or more jurors were discharged during the trial (e.g. due to illness) but the jury would need to retain at least nine members to continue hearing the case.

628. The Policy Memorandum explained the policy objective behind the proposed reduction in jury size to 12, namely that it is to—

"…ensure that Scotland's jury system facilitates the effective participation of jurors and maximises the opportunity for meaningful and robust deliberations. Reducing the size of the jury will help individual members of juries to participate more fully and result in fewer dominant or minimally contributing jurors."

629. The Policy Memorandum also made the point that the change would reduce the impact of jury service on society with fewer people unable to attend work or attend to other commitments such as caring responsibilities. Finally, it argued that it reduced the potential for traumatisation that can arise if sitting on a jury.

630. We heard a range of views on the merits of this change.

631. The written submission from the academics who worked on the Scottish jury research explained what the research had found in relation to jury size—

> "…the Scottish Jury Research found that juries of 15 people deliberated less effectively than juries of 12. Within that study, jurors in 15 person juries were more likely to be observed wanting to contribute but not being able to, and they gave lower ratings of their own influence over the verdict. Deliberations were also less ordered, with jurors more likely to speak over one another and side conversations involving only a small number of jurors developing in parallel with the 'main' deliberation."

632. The submission acknowledged there was an alternative argument that a greater jury size allows for a more diverse range of views to be heard, but commented that "this argument is undermined if jurors are unable to participate effectively in the discussions".

633. A written submission from Beira's Place commented—

> "Beira's Place considers the move from a 15 to a 12-member jury to be a positive one. We expect that this will simplify the process of recruiting and selecting jurors, in turn enabling the court process to move more swiftly and effectively."

634. As we have discussed above, a majority of the Senators of the College of Justice favour retaining 15 as the size of a jury.

635. In a written submission, the Senators noted that any jury comprising a cross section of the public chosen at random could have jurors who ignore the evidence and take an unreasonable position. The Senators concluded that—

> "A jury of 15 persons is much better positioned to deal with such a situation and ensure that the weight of that juror's vote is not disproportionate to the overall view of the jury. The evidential basis for the change is not robust and does not appear to be based on principle."

636. The Committee also heard concerns from representatives of the legal profession about the proposed reduction in the size of juries.

637. In its submission to the Scottish Government's consultation on this subject, the Faculty of Advocates argued that the size of juries should remain at 15 jurors. The submission referred to the argument that the proposal might lead to more jurors participating more fully in deliberations, but concluded that—

> "…such an uncertain conclusion is no basis on which to reform such a fundamental part of the Scottish justice system."

638. That submission noted that—

> "The research on which the proposal to reduce jury size is based has significant limitations. It is based on volunteer mock jurors playing the part of real jurors."

639. A written submission from the Scottish Solicitors Bar Association made a similar point about the quality of the research being used to justify the proposed reduction in the size of juries. The submission also argued that "15 jurors will provide the broadest range of views and therefore improve the quality of deliberation and the likelihood of a just verdict".

640. The written submission from the Law Society of Scotland discussed the arguments for and against a reduction in the size of juries—

> "On the one hand, the larger the jury, the greater the spread of background and experience that can be drawn upon. However, with a jury of 15 there was also a greater risk of more dominant jurors meaning other jurors were less likely to effectively contribute to deliberations."

641. Sandy Brindley from Rape Crisis Scotland found the conclusion of the Scottish jury research that there is likely to be fuller discussion from a smaller jury "quite convincing" but she noted that "my organisation does not have a strong opinion on that".

642. The written response from Scottish Women's Aid stated "there has been no reported problem with a 15-person jury".

643. We asked the Cabinet Secretary for her comments on the proposal to reduce the size of juries. She commented—

> "In essence, reducing the size is about responding to the evidence that says that it improves the process of deliberation. It is no more complicated than that."

Retrials

644. We have previously referred to the proposal made by the Lord Advocate that there should be an additional provision in the Bill to provide for retrials in certain circumstances.

645. The Policy Memorandum sets out the current position in Scots Law in respect of retrials—

> "In most jurisdictions with a common law tradition such as Scotland, a particular majority is required for a guilty or not guilty verdict. If a jury fails to reach this majority (leading to a "hung jury") in these jurisdictions, then the prosecution may be able to re-raise proceedings. This is not the case in Scotland, where anything short of the required majority for conviction is treated as an acquittal and the accused cannot be tried again, except under the very limited circumstances provided for in the Double Jeopardy (Scotland) Act 2011."

646. The Bill does not contain any provisions for retrials.

647. The written submission from the Crown Office and Procurator Fiscal Service explained more about the proposal for retrials referred to by the Lord Advocate in her evidence.

648. The submission noted that under the proposals in the Bill a scenario could arise where a jury of 12 reached a verdict with 7 jurors returning a guilty verdict and 5 jurors returning a not guilty verdict. The accused would be acquitted, notwithstanding that 58 of the jury had returned a guilty verdict, which is a greater majority than currently required for a conviction.

649. In such a scenario, where the majority of a jury returned a verdict of guilty but the statutory majority was not reached, the submission suggested that the court could consider "if it was in the interests of justice not to acquit the accused of the charge but grant an application of the Crown to permit the accused to be retried".

650. Alisdair Macleod from the Crown Office and Procurator Fiscal Service clarified that "we are not suggesting an automatic right of retrial"—

> "It would be similar to the provisions that are undertaken in cases of double jeopardy, where the accused would have a right to make submissions and the court would judge whether it was in the interests of justice to grant that authority."

651. The Lord Advocate referred to the decision as being one of whether a retrial would be in the "public interest". She elaborated on what she meant by this—

> "The question of what is in the public interest can encompass many different things, including the age of the case, the impact on the victim, and the way that the evidence came out at trial. All those things might be relevant to the public interest decision."

652. The Crown Office and Procurator Fiscal Service submission acknowledged the potential additional trauma for a complainer in having to give evidence more than once. However, it argued that this should be balanced against the trauma experienced by a complainer following an acquittal, particularly where the majority of the jury would have found the accused guilty. In addition, the proposed increased use of pre-recorded evidence may remove the requirement for a complainer to have to give evidence at a second trial.

653. The Lord Advocate explained that, in her view, the proposal put forward by the Crown would not be unduly burdensome on the court system, based on the experience in England where there are hung juries in about 1 per cent of cases. She commented—

> "Even at the rate of 1 per cent, that would still amount to in the region of 20 trials per annum, based on current projections of 2,100 jury trials in which evidence is led in 2023-24. I do not think that that would place the burden on the system that has been highlighted."

654. The Committee heard various views on the suggestion that there should be a provision for retrials in the Bill.

655. Some witnesses argued that more detail would be needed about the proposal. Eamon eane of the University of Glasgow commented—

> "I suppose, tentatively, that that could be useful, but I would need much more detail. For example, what would be the court's criteria for granting that? Would it simply be the split in numbers? Would there be other factors?"

656. Stuart Murray of the Scottish Solicitors Bar Association expressed concern about the lack of appropriate research on this subject. He concluded—

> "If any broad, sweeping change to the system is to be made—this is where I revert to my comment—proper investigation and research has to be carried out."

657. Sandy Brindley of Rape Crisis Scotland felt that a complainer would need to play a key role in deciding whether a retrial should be sought. She commented—

> "I think that there is a case for retrial, but, as I said, the decision would need to be made in consultation with the complainer. For some complainers, the thought of giving evidence in two rape trials would be unbearable, whereas other complainers might welcome that."

658. Her view was echoed by Joe Duffy who told us that the option of a retrial should be available but that it should be a matter for the complainer or the victim's family to decide whether to proceed.

659. Stuart Munro of the Law Society of Scotland noted that "what is remarkable about the English system is how rarely juries fail to reach a conclusion one way or the other" and suggested that if the English model for trials was adopted the rate of retrials in Scotland would be in single figures.

660. However, in relation to the particular proposal being put forward by the Crown, he commented—

> "There are different ways of looking at it. I may have misunderstood the Crown submission—forgive me, please, if I have—but I think that it is that, if we had a qualified majority system as provided for in the bill, there might be some scope for the court to be allowed to order a retrial where a particular majority had been reached. There would be concern about that."

Views of the Scottish Government

661. The Policy Memorandum addressed the question as to why the Bill did not propose to allow for a new trial to take place where a majority of jurors in the original trial supported conviction but not by enough to reach the legal required majority for conviction.

662. In summary, the reasons given in the Policy Memorandum were as follows—

- If the Crown cannot persuade the requisite majority of jurors of proof beyond reasonable doubt then acquittal is the appropriate verdict.

- The Scottish Government's consultation found strong support for the proposition that where the required majority was not reached for a guilty verdict, the jury should be considered to have returned an acquittal.

- Retrials could lead to witnesses and complainers giving evidence and being cross-examined twice, which would not be conducive to obtaining best evidence and would risk causing further traumatisation.

- Retrials would contribute to the backlog in the criminal justice system, which would delay justice for complainers and the accused, as well as leading to substantial costs.

663. The Cabinet Secretary commented on the specific suggestion made by the Lord Advocate for retrials in certain circumstances. She commented "I would always seek to take seriously the views of the Lord Advocate, given her independent role". She went on to explain—

> "In our system thus far, retrials have not been a feature. Our system has rested on the finality of verdicts. In terms of transparency between me and the committee, I would want to explore further whether the Lord Advocate has outlined, or is looking for, a system of retrial, or whether it is more about adding in additional exceptions to double-jeopardy legislation. There will, of course, be discussions—that is the short answer."

Summary of views

664. The Committee has taken evidence from various key individuals and organisations in the justice sector about—

- What the impact would be of the abolition of the not proven verdict in respect of conviction rates, and

- Whether there is a requirement for consequential changes to jury sizes and majorities

665. The evidence we received has been outlined in the preceding section of the report.

666. However, given the importance of this subject, it is helpful to summarise the various positions taken by certain key individuals and organisations. We do so in a table below, in order to allow a comparison of the contrasting views we heard.

667. We stress that this is our general summary of the positions taken by certain individuals and organisations, based on the evidence we received. It is not a full summary of all the views we heard on this topic.

Organisation / Individual	**Summary of position**
Scottish Government	• There is clear evidence that jurors may be more likely to convict in a system with two verdicts of guilty and not guilty

	• It is therefore important to ensure that any convictions as a result of abolishing the not proven verdict are safe and the justice system is fair and balanced. • As a result, the Scottish Government proposes a jury size of 12, and a majority of 8 out of 12. • The decisions regarding jury sizes and majorities are 'finely balanced' and matters of judgment.
Academics working on Scottish jury research	• Abolishing the not proven verdict will make convictions more likely but the precise impact cannot be quantified • A majority of 8 out of 12 "feels a little bit too low for a decision that has such magnitude for the accused person" and "might be criticised for creating an unacceptable risk of wrongful conviction". • When pushed, suggested that a jury should strive for unanimity but if that is not possible, then a majority of 10 out of 12 should be required for a conviction.
Witnesses from the legal profession	• The not proven verdict is a safeguard against wrongful convictions and if it is to be abolished then another safeguard must be put in its place, otherwise there will be an increase in wrongful convictions. • Supports the retention of 15 person juries. • A majority of 8 out of 12 is too low. • The Faculty of Advocates propose that a jury should strive for unanimity but if that is not possible, then a majority of 10 or 11 out of 12 should be required for a conviction.
Rape Crisis Scotland	• If the not proven verdict is abolished, the impact would be minimal in rape cases, as it would have an effect in only a handful of cases. • There is no need for any 'balancing' changes to jury sizes and majorities if the not proven verdict is abolished, as the verdict is more likely to add to wrongful acquittals. • The overall package of changes proposed in Part 4 of the Bill could mean that the overall impact of this Bill is to lower convictions in sexual offence cases.
Senators of the College of Justice	• If the not proven verdict is abolished, a jury size of 15 should be retained and a threshold of 10 should be required for conviction. • Decreasing the jury size to 12 will increase the weight of a vote, which may create difficulties if a single juror is unreasonable
Lord Advocate / Crown Office and Procurator	• It is unclear why the removal of not proven would result in an increase in conviction rates. • Urges caution in extrapolating from research that the removal of the not proven verdict would require to be

Fiscal Service written submission	balanced by an increase in the majority that is required for a guilty verdict • Part 4 of the Bill may result in an increase in the number of acquittals in cases which would previously have resulted in conviction. • If the majority for conviction is to be changed, supports a provision for retrial where the jury is split 7/5 in favour of guilty.

Conclusions and recommendations

668. The changes proposed in Part 4 of the Bill would make fundamental reforms to the system of criminal juries and verdicts in Scotland. These are proposals which would significantly alter the system of checks and balances aimed at avoiding wrongful convictions, whilst also seeking to allow for an effective system of prosecution. Thus, they could directly affect the lives of both complainers and accused persons. As such, it is incumbent on us as parliamentarians to consider the proposals extremely carefully, to ensure confidence in the fairness and effectiveness of the Scottish justice system.

669. Our approach to reaching a view on the proposals in Part 4 of the Bill has been guided by the evidence. As we will go on to discuss, the evidence is clearer in some areas than in others.

670. We will take each of the proposals in turn.

671. All criminal cases must be proven beyond reasonable doubt in order to return a guilty verdict. Where that is not achieved, there must be an acquittal. This can be by way of either a not guilty or not proven verdict. However, in law, there is no difference between these two verdicts.

672. On the balance of evidence, having heard arguments for and against, we believe the not proven verdict has had its day and should be abolished.

673. There are several reasons for taking this view. Most notably, we do not think it is satisfactory to have a verdict in a criminal trial which has no accepted legal definition. Some have argued that the not proven verdict is a unique and historical feature of the Scottish legal system, but we do not think this is a good reason to keep this verdict. Furthermore, we heard compelling evidence about the devastating impact which receiving a not proven verdict in a trial can have on victims. Even for the accused, it can be an unsatisfactory outcome which leaves a lingering stigma. We are concerned about the impact on public confidence of a verdict which cannot be defined, and which may encourage juries to ‘sit on the fence’ during their deliberations.

674. We heard from representatives of the legal profession who defended the not proven verdict. They made the case that it offered an important safeguard

against wrongful convictions by offering a 'safety valve' for jurors. This view was challenged by Rape Crisis Scotland and others who took the different view that the problem is one of wrongful acquittals.

675. The representatives of legal profession appeared to acknowledge that there may be a general political consensus that the not proven verdict should be abolished. As such, the debate may have moved on to what legal safeguards, if any, should be put in its place following its abolition.

676. On this subject, the Scottish Government's position is that, if the not proven verdict is abolished, then changes are needed to jury size and (in particular) the majority required for conviction in the interests of maintaining a 'fair and balanced' system. Put simply, its view is that abolishing the not proven verdict will make convictions somewhat more likely, and so other changes (often referred to 'balancing measures') are required which would have the opposite effect.

677. Specifically, the Scottish Government's proposal is to change the size of a jury from 15 to 12 and to set a majority for conviction at 8 out of the 12. If a jury falls to 11 (e.g. due to illness), the majority remains at 8. If it falls to 9 or 10 jurors, then at least 7 jurors will be needed for a guilty verdict. According to the Cabinet Secretary, these changes are about maintaining balance in the system, and not about increasing or decreasing conviction rates overall.

678. It is our role to reach a view on these proposed 'balancing' provisions in the Bill to jury size and majorities.

679. In considering these provisions, the key questions for us, are—

- How strong is the evidence that the abolition of the not proven verdict may (if nothing else is changed) increase conviction rates, and

- Is there therefore a requirement for consequential changes to jury size and majorities?

680. One of the challenges we have faced is that, despite taking extensive evidence, no single clear answer has emerged to these questions. Indeed, some of the evidence we received was contradictory as to whether changes to jury size and majorities were needed, and if so, what they should be. The Committee has been left in a difficult position when it comes to drawing conclusions on the implications for jury size and majorities resulting from the abolition of the not proven verdict.

681. The Lord Advocate told us that the proposed changes to the jury size and majority were "very concerning". The Crown Office's written submission argued that the proposals in Part 4 may result in an increase in the number of acquittals in cases which would previously have resulted in conviction. In this context, the Lord Advocate raised the idea of a retrial provision in circumstances where a 12-person jury split 7-5 in favour of conviction, however the threshold for conviction had not been reached. In those circumstances, the

accused would be acquitted even though a majority of jurors voted for conviction.

682. We also note the position of the Senators of the College of Justice that they would prefer to keep a jury size at 15 in order to reduce the weight given to the influence of any individual juror in relation to the overall view. Their proposal is for a majority of 10 out of 15 rather than the current 8.

683. Further complicating matters is that there have been two recent developments which, we presume, could not have been taken into account during the formulation of the Bill proposals. In September 2023, jury directions were updated to include guidance on rape myths. In addition, in October 2023, a judgment from the High Court of Justiciary Appeal Court clarified the requirements in relation to corroboration. Both these developments at least have the potential to impact on conviction rates, although to what extent is not known.

684. However, taking into account all of the above considerations, we have reached the following conclusions and recommendations.

685. Firstly, we believe that the not proven verdict should be abolished and we support this provision in the Bill.

686. Secondly, in respect of the other proposals in Part 4, our position is that if we are to make any recommendation, this must be supported by robust evidence that 'balancing changes' to juries are needed to prevent an increased risk of wrongful convictions arising from the abolition of the not proven verdict. We also need to have a clearer understanding of the likely impact of any jury changes on conviction rates.

687. However, despite hearing from key figures in the justice sector and questioning the authors of the Scottish jury research, we do not consider that we have heard clear enough evidence as to the nature of the link between abolishing the not proven verdict and the requirement for changes to jury size and majorities. It follows from this that we did not hear convincing evidence in favour of the specific proposals in Part 4 of the Bill to change the size of juries from 15 to 12 with a majority for conviction being set at 8. Indeed, we heard significant concerns raised about the proposals by the Lord Advocate and the Crown Office which we feel duty-bound to take seriously due to the possibility that the effect of the changes may be to lower conviction rates.

688. It is also, unfortunately, the case that we have not heard convincing evidence which would support the adoption of any specific alternative model for jury size and majority. We heard arguments made as to the merits of particular options, and assertions advanced about how conviction rates might be affected, but no compelling or definitive evidence presented which would give us sufficient confidence to endorse any of them.

689. We note that if a 12-person jury is introduced, the Lord Advocate has suggested including a retrial provision in the Bill in the event of a 7-5 verdict. This would be a significant change to the Scottish legal system on which there

had not been any specific consultation. If the Scottish Government were to consider this retrial proposal, further evidence is vital and a full consultation must take place.

690. Overall, then, we recommend that should the Scottish Government proceed with the abolition of the not proven verdict we cannot support the proposed changes to jury size and majority because we have not heard compelling evidence to support this.

691. The Scottish Government and other relevant bodies must work closely with academics and others to collect data on the abolition of not proven and provide a report to Parliament in due course on the impact.

PART 5: SEXUAL OFFENCES COURT

Proposals in the Bill

692. The Bill provides for the creation of a new specialist court to deal with serious sexual offence cases, to be known as the Sexual Offences Court.

693. The creation of a specialist sexual offences court was one of the recommendations in the report of Lady Dorrian's review group, although the approach taken in the Bill departs from the review group proposals in some significant areas. These are highlighted later in this report.

694. The Sexual Offences Court would have the power to deal with a wide range of serious sexual offences, including rape, as well as any other charges appearing on the same indictment, including murder. Its jurisdiction would cover the whole of Scotland.

695. It would only deal with cases prosecuted under solemn procedure, which is used for more serious cases. In effect, the Bill provides that part of the current caseload of solemn sheriff courts and the High Court could instead be dealt with by the Sexual Offences Court.

696. Schedule 3 of the Bill sets out a list of 'sexual offences' for the purpose of the court's jurisdiction. Section 39 gives the Scottish Ministers the power to amend this list by way of affirmative regulations.

697. As is the case for other cases prosecuted under solemn procedure, the general position would be that any trial in the Sexual Offences Court would be heard before a jury. However, as we will go on to discuss in a later section of this report, the pilot of judge-only trials for rape cases and attempted rape cases, which is proposed in Part 6 of the Bill, could take place in the new court or in the High Court.

698. The features of the proposed court would include—

- A requirement for both judges and legal professionals to have successfully completed specialist training if they wish to appear in the court – though the Bill itself does not require this in relation to prosecutors.

- The power to impose any sentence which the High Court could impose for the same offence, including the power to impose custodial sentences of up to life imprisonment and the power to impose an Order for Lifelong Restriction.

- Rights of audience which would preserve the existing requirement for advocates or solicitor advocates to appear in rape and murder cases but otherwise would allow solicitors to appear.

699. The eligibility requirement for appointment as a judge of the Sexual Offences Court would be that a person meets all of the following requirements—

- They already hold a relevant judicial office: High Court judge (including temporary judge) or sheriff (including sheriff principal)

- They have completed approved training on trauma-informed practice in sexual offence cases

- They have the skills and experience which the Lord Justice General considers necessary

700. The Bill provides that the Lord Justice General will appoint judges to the Sexual Offences Court. The Lord Justice General would have the power to remove a judge appointed to the court.

701. The Bill also provides for the creation of two new statutory judicial officer roles to be known as the "President of the Sexual Offences Court" and the "Vice-President of the Sexual Offences Court".

702. The procedure in the Sexual Offences Court is intended to mirror that of the High Court other than where the Bill makes provision to the contrary or when bespoke court rules and procedures are made in the future. However, the Bill contains a presumption in favour of vulnerable complainers being able to provide their evidence in advance of the trial. In addition, the accused would not be able to represent themselves in any court hearing where a witness is to give evidence.

703. We will discuss the proposed features of the specialist court in more detail later in the report.

704. However, we will first discuss the general principle of establishing a separate court for sexual offences.

Views on principle of a sexual offences court

705. We heard different views on whether the general approach taken in the Bill of establishing a new court to deal with sexual offences was the right one.

706. We also explored the question of whether an alternative model of specialist division of the High Court might have been more appropriate.

Reason for a new court

707. The Policy Memorandum explained the reasons put forward by the Scottish Government for proposing a separate new court. It commented that the objective is—

> "to maximise its ability to deliver targeted, meaningful and enduring improvements in a consistent manner to cases involving serious sexual offences. By seeking to gather together all solemn level sexual offence cases in one court, the Sexual Offences Court will allow a specialist approach to apply consistently across these cases and provide for the flexible use of resources (including court

and judicial resources which are currently restricted by distinctions drawn between the sheriff courts and the High Court)."

708. The Policy Memorandum argued that bringing together all solemn level sexual offence cases into "one unified court" recognises the often common challenges faced by all complainers in serious sexual offence cases regardless of the forum their case is prosecuted in.

709. Lady Dorrian explained that her review group "felt quite strongly that simply creating another division of the High Court, for example, would not achieve the necessary end". She argued that—

> "What was needed was a court of full national jurisdiction, with trauma-informed practices embedded common training of individuals across the court procedures that are uniformly applicable to the sheriff court and the Court of Session, which is not currently the case and uniformly applicable practice notes and directions, which, again, is not currently the case."

710. Lady Dorrian emphasised the role of the new court in minimising the trauma experienced by complainers and witnesses. Her view was that if judges, court staff, prosecutors and defence lawyers had been trained to standards set by the Lord President, "that should achieve a change of culture".

711. She referred to previous changes as having been done in a piecemeal way and commented that "they are not being done in a principled way, with the underpinning of a whole court that is dedicated to trauma-informed practices".

712. However, Lady Dorrian also commented that the model for the court provided for in the Bill differed from what she had envisaged. She commented that "it seems to be trying to create some sort of new and different structure, as opposed to fitting what I had in mind into the existing structure". She went on to state—

> "What I had in mind was, in a sense, a parallel court, but with the Lord Justice General as the head of that court and the Lord Justice Clerk as the deputy head, as is generally the case across the court system. The court would be able to use all of the court estate and all of the judicial resources, as necessary, as long as properly trained people were in place."

713. The Cabinet Secretary gave us her view on the proposal for a new court. She commented "it will be transformative"—

> "ou will have heard lots of evidence about the opportunities when you build something from the ground up. The founding principle of the court is to improve the experience of complainers. There is broad support for the establishment of a court with national jurisdiction and the ability to operate in around 40 venues across the country, and it is within the gift of us all to shape how the new court is seen."

Other views

714. We heard several views expressing general support for the principle of establishing a Sexual Offences Court.

715. The Lord Advocate told us that the proposed court would present an opportunity for "positive, radical change in the way that the criminal justice system approaches sexual offending".

716. We asked her about the alternative model of specialism within the existing court structure and she responded that—

> "It is easy to say that we could do all of this with what we have. Why has that not happened? That is the simple answer to the question."

717. The Lord Advocate told us that "what is happening at the moment is just not good enough" and that efforts which have been made over the years, such as the rape shield provisions and changes in evidence by commission "have not shifted the dial on the basic problems that remain" in respect of complainers' experience of the justice system.

718. Lord Matthews told us that—

> "The judiciary is, broadly speaking, in favour of the proposal for a sexual offences court. We agree with the thinking of and the conclusions drawn by Lady Dorrian's review group, for the various reasons that she has set out."

719. Lord Matthews commented on the suggestion that the new court would have less status than the High Court. He told us—

> "I do not agree that there is a downgrading. Instead, there is an upgrading, if you like, by giving those particular cases a special court to deal with them, rather than their simply being part of the day-to-day business of the High Court. I would have thought that the formality of the court would be exactly the same as that of the High Court."

720. Sheriff Andrew Cubie expressed a similar view and stated he had "no reservations about the degree of solemnity or downgrading as a result of characterising some offences as being part of the sexual offences court".

721. David Fraser from the Scottish Courts and Tribunals Service argued that "potentially, it will be a sea change in how sexual offence cases are dealt with" and noted that "it is time for the clean-sheet approach of a brand new court that will encompass a lot of new things".

722. His colleague Danielle McLaughlin noted that one of the advantages of the court will be its uniformity of approach. She noted that at the moment "we have a two-tier system", with differences in practice between sexual offences crimes heard at sheriff court level and those heard in the High Court.

723. Professor James Chalmers of the University of Glasgow felt that the success of the proposed court would largely depend on the training which is offered to the

participants. He commented that the new court "is a welcome development, but the changes might not be as substantial as they might at first appear".

724. The written submission from Police Scotland argued that the new court "will increase professionalism and support for victims and witnesses and increase capacity in other courts for other business".

725. We heard some views which were more sceptical of the proposal.

726. The written submission from the Faculty of Advocates stated—

> "Faculty considers that there is no single feature of the proposed court which could not be delivered rapidly by introducing specialism to the existing High Court and Sheriff Court structures."

727. The written submission from the Law Society of Scotland was also more supportive of the idea of establishing a specialist sexual offences division of the existing courts. The submission stated that specialism has the potential to reduce delays, increase consistency of experience for all participants, encourage early resolution where appropriate, and ensure the focus remains on issues properly in dispute.

728. Simon Di Rollo □C commented—

> "There is a danger that creating a specialist court would be just a bit of window dressing and that it would not get to the nitty-gritty of what you are trying to achieve. A culture change in the way in which lawyers approach things is necessary, and we should recognise that."

729. Tony Lenehan □C from the Faculty of Advocates commented on the implications of certain cases which would have been heard in the High Court being moved to the Sexual Offences Court. He argued—

> "Such offences are worthy of being tried in the High Court, and I do not see the justification for stepping them down below that, unless the reason is purely financial. I do not reject the fact that financial decisions are important, but that does not seem to be the way that it is being couched. If that is a hidden part of it for some proponents of the bill, I very much regret that."

Views of victims / survivors of crime

730. The proposal for a Sexual Offences Court was generally welcomed by organisations representing victims of crime, including Victim Support Scotland, Scottish Women's Aid and Rape Crisis Scotland although some concerns were raised. The requirements for specialist training for all those working in the new court was particularly welcomed. □ate Wallace of Victim Support Scotland told us—

> "Enabling everybody to be trained in both trauma-informed approaches and sexual crime is really important, and we think that the specialist sexual offences court provides an opportunity for that."

731. Emma Bryson of Speak out Survivors explained that she supported the creation of a new court in theory but expressed caution about whether, in reality, it would meet its objectives.

732. A similar note of caution was struck by Sandy Brindley of Rape Crisis Scotland who commented—

> "…my concern is that we do not want there to be a courtroom in Glasgow High Court that has a label on the door that says, "Specialist Sexual Offences Court", but there is literally no difference other than that the people involved have maybe been on a day's training."

733. Another view in support of a new court came in the written submission from Moray VAWG Partnership, which noted that—

> "We strongly support this measure - sexual offences are complex, traumatic and subject to significant misinformation. A specially trained staff (from judges counsel to court reporters) is essential to ensure they are dealt with justly and a dedicated court system would seem to be an effective way to ensure this."

734. Dr Marsha Scott of Scottish Women's Aid noted that the specialist domestic abuse courts piloted in Glasgow had delivered "some excellent outcomes", including reduced witness attrition, speedy trials, better evidence, and reduced trauma. She observed that some of the arguments which had been made against the specialist domestic courts in Glasgow were similar to the ones now being deployed against the proposed Sexual Offences Court.

735. On this subject, Sheriff Andrew Cubie told us about his experience as a sheriff in the domestic abuse and the family court. He told us—

> "I can speak of the particular benefits of specialisation and expertise and the consistency that arises from specialisation, which would be one of the benefits of a sexual offences court that has a discrete jurisdiction."

736. We asked some of the survivors of sexual crimes for their views on the proposed new court.

737. In general, they were supportive in principle. Witness 2 noted, for example, that "if there were a specialist sexual offences court, that would allow it to ensure that all the mistakes that are already happening cannot happen". Some of the survivors made reference to the special measures which could be implemented in the court in order to improve the experience of complainers.

738. However, we also heard some views from survivors about the importance of maintaining the solemnity of court proceedings as a sign of the importance with which society treats the crime of rape. Ellie Wilson expressed concerns about the solemnity of proceedings in the new court and commented—

> "Rape is one of the most serious crimes in Scots law such cases are only ever heard in the High Court. That solemnity is sacred, and it is important that we maintain it."

739. Sarah Ashby commented—

> "I would not like for such cases to be dismissed or for us to be made to feel that they are any less significant than they are. When you get the information through that the trial is going to the High Court, there is an element of realising how important that is."

Rights of audience

740. As we have discussed, several witnesses commented on the likely status of the new court relative to the High Court and questioned whether it would have the degree of seriousness consistent with the nature of the crimes which will be heard.

741. One of the main areas of concern was about the rights of audience in the new court. 'Rights of audience' refers to who is able to represent a person in court proceedings.

Proposals in the Bill

742. At present, solicitors, solicitor advocates and advocates are able to represent the accused in sheriff courts. However, only solicitor advocates and advocates can represent the accused in the High Court.

743. In the report of Lady Dorrian's review group, it was recommended that rights of audience in the Sexual Offences Court should be limited to advocates and solicitor advocates, as is the case in the High Court. The report stated—

> "Consistent with the serious nature of the cases involved, many of which are currently prosecuted in the High Court, the rights of audience should reflect those applicable in that court."

744. However, the Bill take a different approach, and provides that appropriately trained advocates, solicitor advocates and solicitors will have rights of audience in the Sexual Offences Court. According to the Policy Memorandum, "this recognizes the range of cases and offences that will be heard in the Court".

745. However, there is an exception for cases which involve a charge of rape or murder, in which case only those with rights of audience to appear in the High Court (advocates and solicitor advocates) will be able to appear.

746. The Policy Memorandum explained the reasons for this—

> "Limiting the rights of audience for cases involving these offences ensures that the accused continues to be entitled to receive the same level of representation as where the case is heard in the High Court and avoids creating the perception that these offences are being downgraded."

747. The Policy Memorandum also explained why the approach to rights of audience proposed in the report of Lady Dorrian's review group was not adopted. It noted that

the proposal had been considered by a cross-sector working group which was tasked with examining the new court, but it had been—

> "…discounted on the basis that it would require advocates and solicitor advocates to take on a significant number of additional cases by virtue of the redistribution of sheriff solemn court cases into the Sexual Offences Court and was therefore unachievable given existing pressures on advocates and solicitor advocates."

748. The Policy Memorandum also noted that—

> "The proposal was also considered to be undesirable in that it would prevent solicitors from gaining experience in appearing in solemn level sexual offence cases."

749. The position in relation to the status of prosecutors in the new court is somewhat different. Essentially, the Bill is silent on this matter and leaves discretion to the Lord Advocate.

750. By way of background, the Policy Memorandum explains that—

> "…in the High Court prosecutions are conducted by advocate deputes (known collectively as "Crown counsel") who are appointees of the Lord Advocate. In the sheriff solemn courts, prosecutions are normally conducted by procurator fiscal deputes on the authority of having been granted a "Lord Advocate's Commission".

751. The Policy Memorandum goes on to state that in relation to the Sexual Offences Court—

> "The Bill does not make any provision regarding rights of audience for prosecutors as their appointment is a decision for the Lord Advocate, acting independently of any other person, as provided for under section 48(5) of the Scotland Act 1998."

Views on rights of audience

752. We asked Lady Dorrian for her comments on the approach to rights of audience in the Bill when she gave evidence. She did not directly comment on the Bill proposals but noted—

> "□ou have picked up on the fact that we recommended that the court should have rights of audience equivalent to those in the High Court, because we wanted to ensure that its importance would be understood and that serious matters would be dealt with at a particular level. That was why we said that the right of audience should be for solicitor advocates with extended rights or for advocates."

753. Lady Dorrian also highlighted "the additional training in court craft and in court processes, procedures and behaviour that someone gets if they become an advocate or get extended rights of audience".

754. Some witnesses expressed concern that the proposed rights of audience in the new court could mean that it is perceived as having a 'downgraded' status when compared to the High Court.

755. Sandy Brindley of Rape Crisis Scotland noted that "these are very complex cases" and commented that she had some concerns about the rights of audience not being equivalent to the position in the High Court.

756. The written submission from Rape Crisis Scotland explained that there were some sexual offence cases which are currently heard in the High Court (where representation must be provided by an advocate or a solicitor advocate), which would only require representation from a solicitor in the Sexual Offences Court. The submission noted—

> "The rights of audience that are provided for in the Bill mean that only cases of rape and murder will have the restriction that an advocate or solicitor advocate can defend an accused person and only an Advocate Depute can prosecute. We do not feel this restriction on the rights of audience goes far enough to provide protection… All cases that would have been tried in the High Court under the current model should continue to have the protection afforded by the appropriate level legal representatives appearing."

757. Tony Lenehan KC from the Faculty of Advocates told us that "the practical reality of what you are being asked to deliver in the bill is a downgrading of rape towards the sheriff court". He commented that—

> "At the moment, because a rape trial will be in the High Court it will be either a solicitor advocate or an advocate who prosecutes the case, so it will be an advocate depute who is from the elite corps of prosecutors. The bill will allow that to change, so that a procurator fiscal depute can prosecute."

758. He went on to state that—

> "Looking at it in the round, my fear is that the prosecutors will be sheriff court prosecutors—I mean no offence by that, but they will not be advocate deputes, who are an elite cadre of High Court prosecutors—and that the judges will be of a rank below High Court judge, otherwise the bill would not have section 41(4)."

759. He concluded that "my worry is that, for some, the specialist court is a flag of convenience under which they sail towards cheaper rape convictions" and he suggested that "whatever the specialist court looks like and wherever it sits, cases that were in the High Court continue to be prosecuted by people of a High Court standard".

760. Another issue relating to rights of audience was raised with us by Sandy Brindley of Rape Crisis Scotland. She expressed concern that there is nothing in the Bill to provide for the removal of the right of a particular professional to act in the Sexual Offences Court. She did not think that it would be appropriate to rely on professional bodies to undertake this role.

Position of the Scottish Government

761. The Cabinet Secretary wrote to the Committee on 16 February 2024 to set out the reasons for the particular approach proposed in the Bill to rights of audience in the Sexual Offences Court.

762. In her letter, the Cabinet Secretary reiterated the reasons for departing from the recommendation in the report of Lady Dorrian's review group that rights of audience in the court should be restricted to advocates and solicitor advocates. She referred to the concerns expressed by the cross justice-sector working group established to consider the operation of the court. She noted that the new court brings together all solemn level sexual offending prosecuted in the sheriff and jury courts and the High Court and so it—

> "would require advocates or solicitor advocates to appear in a far greater number of cases than at present (the Financial Memorandum refers to over 300 additional cases per year). This could not be easily absorbed by the current cadre of advocates and solicitor advocates and would undoubtedly lead to delays in cases coming to trial."

763. She also noted the concerns expressed by the working group that the restriction proposed by Lady Dorrian's review group would impact on the capacity of solicitors to build knowledge and experience of sexual offence cases. The Cabinet Secretary commented that—

> "I also see merit in having solicitors in the Court, specially trained in trauma informed practice, building skills and experience and developing their practice in dealing with these types of cases"

764. As we have discussed, the Bill allows solicitors rights of audience in the Sexual Offences Court, except for cases involving rape or murder.

765. However, the Cabinet Secretary addressed a concern which had been raised with us by Rape Crisis Scotland, namely that the High Court currently hears cases involving serious sexual offences which do not include rape or murder. As the Bill is drafted, the accused in these cases could now be represented by a solicitor in the Sexual Offences Court, whereas previously in the High Court representation would be at solicitor or solicitor advocate level.

766. In her letter, the Cabinet Secretary commented—

> "The complexity in identifying those cases for the purpose of restricting rights of audience is that almost all of the other offences that appear in the High Court do so following the exercise of prosecutorial discretion and therefore the actual offence itself does not provide a definitive or meaningful indication of whether it will be prosecuted in the High Court or sheriff and jury court."

767. However, the letter from the Cabinet Secretary went on to state that—

> "We are working with justice partners to identify a suitable mechanism to ensure that an appropriate test is developed that would allow, as far as possible, for 'otherwise High Court cases' to be identified and made eligible for Legal Aid for advocates or solicitor advocates. I have asked my officials to explore whether

this mechanism can be placed in primary legislation to provide the reassurance Members are seeking in respect of this important aspect of the Court."

768. In relation to the rights of audience for prosecutors, the Cabinet Secretary reiterated in her letter of 16 February 2024 that the Lord Advocate, in her role as independent head of the prosecution service, is not restricted in who she can appoint to prosecute a case on her behalf. According to the Cabinet Secretary, the independence of the Lord Advocate in the Scotland Act 1998 means that—

> "It is therefore not within the legislative competence of the Scottish Parliament to seek to place any obligations or restrictions on those who prosecute on behalf of the Lord Advocate."

769. In relation to the standard of prosecutors in the new court, the Lord Advocate clarified her intentions when she gave evidence. She commented—

> "I see the specialist sexual offences court as being the supreme court, sitting alongside the High Court, in the prosecution of sexual crime. In our High Court, with my commission, advocate deputes prosecute those cases and I certainly would not see any diminution in the quality, training and standard of the prosecutor. Therefore, for the special sexual offences court, from my perspective I do not see it being anyone other than an advocate depute prosecuting, with extended rights of audience. It would not be someone who did not have extended rights of audience to prosecute in the High Court who would be prosecuting those cases."

Sentencing

770. As discussed above, the Sexual Offences Court would be able to impose any sentence which the High Court could impose for the same offence.

771. The Policy Memorandum noted that Lady Dorrian's Review had recommended a 10-year sentencing limit for the Sexual Offences Court, with the ability to remit cases deserving of a lengthier sentence to the High Court.

772. This proposal was considered by the cross-sector working group which was tasked with examining key aspects of the new court. However, according to the Policy Memorandum—

> "There was unanimity among the Working Group that placing a limitation on sentencing powers risked giving the perception that serious sexual offences were being 'downgraded', and that it was counter intuitive to create a Sexual Offences Court that did not have all the powers it needed to deal with the most serious sexual offences."

773. The Policy Memorandum commented that the approach taken to the sentencing powers in the new court in the Bill is to ensure "it is perceived as being of equivalent stature as the High Court when it sits as a court of first instance, which currently has

exclusive jurisdiction over rape and murder" and "there is no perception that those cases are being 'downgraded'."

774. Furthermore, the Policy Memorandum noted that cases which would formerly have been heard in the sheriff court (with a maximum sentencing powers of five years' imprisonment, although capable of being remitted to the High Court for a lengthier sentence) will now be heard in a court with unlimited custodial sentencing powers. This is to avoid 'tiers' being created in the new court and to ensure that all cases are treated consistently.

775. Sandy Brindley of Rape Crisis Scotland indicated that she had been reassured by the approach taken in Bill in relation to sentencing powers. She commented that—

> "From our perspective, the risk of downgrading related primarily to the new court having limited sentencing powers. It is clear to me, however, that the proposed court is equivalent to the High Court in its unlimited sentencing powers, and I anticipate that it will be taken as seriously as the High Court."

776. The Cabinet Secretary told us that—

> "I am firmly of the view that the sexual offences court should have unlimited sentencing powers. That is a departure from the work that was undertaken in the original review. We should absolutely guard against any perception that the court is a downgrade it is a court with status that should have the same powers as the High Court, given the gravity of some of the offences that it will be dealing with."

Appointment of judges

777. As we have discussed, the eligibility requirement for appointment as a judge of the Sexual Offences Court is that a person meets all of the following requirements—

- They already hold a relevant judicial office: High Court judge (including temporary judge) or sheriff (including sheriff principal)
- They have completed approved training on trauma-informed practice in sexual offence cases
- They have the skills and experience which the Lord Justice General considers necessary

778. Within these parameters, the power to make appointments rests with the Lord Justice General. There are no restrictions on the number of judges of the Sexual Offences Court that can be appointed.

779. Judges of the Sexual Offences Court would be appointed for such period as the Lord Justice General specifies when making the appointment

780. They would retain their other judicial role and could continue to deal with cases in that capacity.

781. The Lord Justice General would have the power to remove a judge appointed to the Sexual Offences Court. The Bill does not seek to outline the possible reasons for doing so. It is left to the Lord Justice General to determine when it might be appropriate.

Role of sheriffs and sheriff principals in the new court

782. One of the implications of the proposals in the Bill is that sheriffs, who meet the relevant requirements, could be appointed to the role of judge of the Sexual Offences Court and hear cases of rape and murder and sit with unlimited custodial sentencing powers.

783. This would represent a departure from the current position where rape and murder cases are heard by judges who preside in the High Court.

784. The Policy Memorandum justified the approach taken in the Bill by arguing that it was recognised that—

> "…it is largely the knowledge, experience and training of a judge, rather than which judicial office they currently hold that ought to determine their suitability to hear these cases."

785. The Policy Memorandum also noted that it is already the case that sheriffs can be appointed as temporary judges and preside over rape and murder cases in the High Court.

786. The Policy Memorandum noted that an alternative approach to that taken in the Bill would have been to restrict criteria for appointments to the new court so that only High Court judges would be able to preside over cases. However, the Policy Memorandum argued that this would be "undesirable and unworkable given the ambition of the Court to consolidate all serious sexual offences into one court". Furthermore, the Policy Memorandum argued that—

> "…this would lead to a caseload which would be unable to be serviced by High Court judges alone and would deprive sheriffs of valuable experience in presiding over these cases."

787. The Policy Memorandum highlighted another alternative approach which would have been to allow sheriffs to be appointed as judges of the Sexual Offences Court but to restrict them from presiding over cases of rape and attempted rape and murder. However, it argued that this would "result in a two tier Sexual Offences Court, replicating existing distinctions but at the same time introducing additional complexity to the current system".

Views on the appointment of judges

788. Lady Dorrian indicated that she did not have concerns about the prospect of sheriffs being appointed as judges of the Sexual Offences Court. She commented that—

> "Sheriffs do sit as temporary judges in the High Court at the moment. A very significant number of them do that, and they do a very good job indeed, so that is not the issue."

789. However, she noted that—

> "…some of the structural requirements and concepts, including the possibility of the president of the new national sexual offences court being someone other than the Lord Justice General or the Lord Justice Clerk, seem to be overcomplicated—and, if I may say so, counterproductive, especially given that the holders of those two offices have driven all the reforms over the past 10 years."

790. Tony Lenehan □C from the Faculty of Advocates expressed concerns about, as he put it, "the level of the judges" in the Sexual Offences Court. He commented that—

> "…section 41(4) says that, if the president of the court is not the Lord President or the Lord Justice Clerk, it cannot be any of the judges of that court—it has to be a senator of the High Court. That says to me that the bill is designed so that judges in the specialist court are to be subordinate to High Court judges."

791. Lord Matthews noted that appointment of judges to the Sexual Offences Court will be a matter for the Lord Justice General. However, he told us—

> "…I cannot imagine there being any issue about the seniority of those judges. The Lord Justice General is not in the business of appointing people who are not senior enough to do the job…. Generally speaking, the appointment of judges is done on the basis of skill and experience. I struggle to see where the concern of the faculty arises from."

792. The written submission from the Sheriffs and Summary Sheriffs' Association raised several comments about the provisions in the Bill for the appointment of judges to the new court. The points made in the submission included—

- It is not clear whether sheriffs will be appointed, or invited to apply for appointment, to the court. It is also not clear whether in practice the sheriffs appointed to the court will be those who already hold appointments as temporary judges. The submission notes that "these are important practical matters and should be the subject of express provision".

- There is a risk of vicarious trauma if judicial office-holders hear sensitive and often harrowing evidence every day.

- There should be a clear statement of the amount of time judicial office-holders will be expected to serve on the court.

- The procedure for removing a judge of the Sexual Offences Court from office requires to be clarified. The submission notes that "there is currently no test or set of circumstances in the Bill which would manage this process" and states "we consider that is highly anomalous".

- There is concern that, following the establishment of the Sexual Offences Court, the business of the sheriff court is likely to remain closer to current levels with potentially fewer sheriffs available to deal with it.

- It is not clear whether sheriffs appointed to the court will be paid at an enhanced rate, to reflect the additional responsibility involved in presiding over cases which might formerly have been heard in the High Court.

793. On the appointment of judges to the Sexual Offences Court, Alan McCreadie of the Law Society of Scotland noted that "there seems to be no locus at all for the Judicial Appointments Board for Scotland in either the appointment of judges to the court or their removal from it".

794. However, a written submission from the Sheriffs Principal was supportive of the proposed appointment arrangements. The submission stated—

> "We support the proposal that the judges of the new court be appointed by the Lord Justice General. In our experience, the existing arrangements for the appointment of temporary judges on the same basis works well in practice. Any other procedure would be unnecessarily bureaucratic and would necessarily involve the Judicial Appointments Board for Scotland which is already overstretched in its workload."

795. The written submission from the Senators of the College of Justice discussed the question of the tenure of judges of the Sexual Offences Court.

796. In particular, it referred to the powers given to the Lord Justice General to remove a judge (including the president and vice president) from their office without any reason, though not from the office which that judge held prior to appointment to the Sexual Offences Court.

797. The submission from the Senators noted that a criticism of the proposals is that—

> "These provisions, which are in contrast to the procedure for removal of a judge in the Scotland Act may constitute interference with a judge's security of tenure. ECHR article 6 requires an accused person to be tried by an independent and impartial tribunal established by law. In the case of Starrs v Ruxton 1999 SCCR 1052 it was held that security of tenure was essential for juridical independence."

798. However, the submission also stated that a contrary view is that since all judges of the court would be senators, sheriff principals, sheriffs and temporary judges, removal from the court would not deprive a judge of judicial tenure. Furthermore, the submission noted that the Lord Advocate has no role in the appointment or removal of a Sexual Offences Court judge and it was that involvement which was objectionable in Starrs v Ruxton.

799. In light of the above commentary, the written submission from the Senators stated—

> "Nevertheless, given the criticisms made of clauses 40 and 41 of the Bill and the status of the proposed court, the Scottish Government may wish to consider

whether it would be preferable for Sexual Offence Court judge appointment to involve some level of tenure and for removal to require more formality, in order to reduce the prospect of litigation."

800. Alan McCreadie of the Law Society of Scotland raised a similar point about removal of judges from the Sexual Offences Court. He noted that "the society's respectful position is that, if the kick-off point is article 6 of the European convention on human rights—that a fair trial must be afforded to the accused—a challenge may be brought over questions about the tenure of the judge".

801. The Cabinet Secretary responded to the concerns expressed in evidence regarding the Lord Justice General's power to remove judges, by stating—

"…we have listened carefully and are looking at potential amendments so that the situation is clear and unambiguous. There is an arrangement for the appointment and removal of temporary judges, and it might be that we need to make things clear in the bill by introducing provisions that mirror those arrangements."

Other charges on same indictment

802. As we have discussed, the Sexual Offences Court will have national jurisdiction to hear any indictment which includes a relevant sexual offence as well as any other charges that appear on the same indictment, including murder.

803. This proposal attracted some comment from individuals and organisations who gave evidence, particularly in respect of the powers of the new court to hear murder cases.

804. The Policy Memorandum, at paragraph 280, explains the reasons for including this provision in the Bill. It states—

"There are known cases in which sexual abuse perpetrated by an accused is alleged to have escalated over time, against multiple complainers, ultimately leading to a murder. Given the experience of the surviving complainers and the nature of their evidence (where historical sexual offending is libelled alongside a murder charge), the policy objective is to afford those complainers the benefits of the case being prosecuted in the Sexual Offences Court."

805. The Policy Memorandum notes, however, that the decision as to whether any individual case, including those involving rape or murder, is to be prosecuted in the Sexual Offences Court, will be a decision for independent prosecutors acting on behalf of the Lord Advocate. It states that "it is considered that it is right for prosecutors to have the option of choosing the Sexual Offences Court where they deem it appropriate" and—

"The Bill permits, rather than requires, cases under its jurisdiction to be heard in the Sexual Offences Court."

806. The written submission from the Senators of the College of Justice commented on the proposal to permit the Sexual Offences Court to hear murder charges that appear on the same indictment as a sexual offences charge. The submission referred to the scenario which is cited in paragraph 280 of the Policy Memorandum (see above) but noted—

> "…there are not many such cases and the anecdotal nature of para 280 gives no confidence that this major constitutional change has been thought through properly. The appropriate place for charges of murder and attempted murder is the High Court. Murder is the most serious charge in the criminal canon."

807. Lord Matthews summarised the position of the Senators as follows—

> "I am sure that you will think about it very carefully, but we think that murder should stay where it is, because it is the most serious crime, and the High Court has to be the one that deals with that."

808. When Lady Dorrian gave evidence, she explained that the report of her review group had recommended that crimes such as murder should continue to be tried in the High Court, even if there is an associated sexual offence with the charge. However, she commented that—

> "I do not think that one could go as far as to say that the sexual offences court should deal only with sexual offences, because it is frequently the case that an indictment includes, for example, a dozen charges, 10 of which might be sexual offences, one of which might be a breach of the peace and one of which might be a drugs offence. Therefore, it is not practical to suggest that the court should not have jurisdiction over other crimes."

809. David Fraser of the Scottish Courts and Tribunals Service indicated that he supported the proposal in the report of Lady Dorrian's review group. He commented—

> "□ou have to ask yourself what the purpose of the High Court becomes if some of the privative jurisdictions of cases that go through that, such as murder, are moved into the specialist sexual offences court."

810. Alan McCreadie of the Law Society of Scotland raised a scenario in which a case is heard in the Sexual Offences Court on the basis of a sexual offence charge on the indictment but that charge is subsequently dropped, leaving the court to proceed with the remaining non-sexual offence charges. He posed the question "How much of a sexual offences court will it actually be?".

811. Tony Lenehan □C of the Faculty of Advocates linked his concerns about the prospect of murder cases being heard in the Sexual Offences Court with his concerns about rights of audience for prosecutors. He commented—

> "It is a regressive step to have a situation in which a murder case goes into another court, and—as per my comments earlier—is possibly prosecuted by a procurator fiscal depute□that is not a progressive step."

812. The Cabinet Secretary acknowledged that the approach taken in the Bill diverged from the recommendation of Lady Dorrian's review group, but, in doing so, she had sought to take on board points raised with her by the Lord Advocate. The Cabinet Secretary noted that "the discretion in deciding what offence goes where for murder cases in which there is a sexual element would, ultimately, remain with prosecutors".

813. She commented—

> "Right now,… my preference is that the Crown should have the discretion to decide whether sexualised murder cases go to the sexual offences court or the High Court. I also want to acknowledge and put on the record that there are very sound reasons why such a case could and should go to the sexual offences court, bearing in mind the needs of surviving victims and witnesses."

Floating trials

814. We have previously discussed the issue of floating trials in the section of the report on Part 2 of the Bill on trauma-informed practice.

815. Several witnesses also raised the issue of floating trials in the context of the procedures of the Sexual Offences Court.

816. The approach in the Bill to the procedures of the new court is that, with a couple of exceptions, they are intended to mirror that of the High Court. The Bill does not, therefore, contain any specific provisions about the use of floating trials in the Sexual Offences Court.

817. The Bill does, however, include a provision that when the President of the Sexual Offences Court makes arrangements "for ensuring the efficient disposal of business in the Sexual Offences Court", they are required to "have regard to the desirability of doing so in a way that accords with trauma-informed practice". This mirrors the new obligations imposed in relation to the scheduling of business in other courts, which are introduced in Part 2 of the Bill, and which we have discussed earlier in this report.

818. The Bill does not indefinitely tie the Sexual Offences Court rules and procedure to those of the High Court. Instead, the Policy Memorandum states that the provisions are intended to "ensure there is flexibility to develop distinct rules and procedures over time including for the purposes of embedding specialist, trauma-informed approaches".

819. When we asked Witness 2 about the proposed Sexual Offences Court she commented—

> "I hope that it could also address delays and floating trials. I am sure that, with one specialist sexual offences court, the days would matter and there would be no more of people turning up to court and waiting to see who has been arrested the night before, whether a case can go ahead, or who has shown up."

820. Sandy Brindley of Rape Crisis Scotland expressed disappointment that the proposals for the new court do not provide for the removal of floating trials.

821. Emma Bryson of Speak out Survivors expressed a similar view and told us—

> "We have concerns about a lot of the practical stuff. Floating trials are dehumanising for everybody involved—not just the victims but the accused in sexual offences cases. We need to see evidence for the idea that the specialist court will somehow fix a whole lot of issues."

822. The Cabinet Secretary commented—

> "….I would very much like to see a reduction in the use of floating trial diets. The sexual offences court will have the opportunity to set its own rules, so that will be a matter for it to consider."

Resources

823. The issue of the level of resources required to support the Sexual Offences Court was also raised in evidence.

824. The Lord Advocate described the need for "resource across the board" and noted that—

> "…if we were to shift the level of cases from the sheriff and jury level to the specialist sexual offences court—which I think is a good idea—we would have to have far more resource. We have provided figures for our estimate of what that would cost. At this stage, it is only an estimate, and we have done our best to explain that. The sum and substance of it is that we would not have the resource available to conduct the specialist sexual offences court in the way that the ambition requires."

825. The Lord Advocate commented on some of the projected costings—

> "We have projected that it would be reasonable to assess the increased cost of the cases that we would call in the specialist court, as opposed to the sheriff and jury court, as being set at a level of perhaps half the average High Court case cost, which is £37,157 per case. That would mean an additional cost of about £17 million per annum—if the cases were moved from the sheriff and jury level into the special sexual offences court."

826. The written submission from the Scottish Courts and Tribunals Service to the consultation by the Finance and Public Administration Committee on the Financial Memorandum commented that the figure in the Memorandum could be an underestimate. The submission noted—

> "…the extensive proposed jurisdiction of the court (which goes far beyond that recommended by the Lord Justice Clerk's Review). That taken with the prosecutors discretion, and the potential for the new Court to act as an incentive for more alleged crimes to be reported, the numbers projected have the potential

to be much higher than stated in the Memorandum, with consequential implications of resourcing."

827. Dr Marsha Scott of Scottish Women's Aid highlighted the importance of resourcing the reforms in the Bill, including the Sexual Offences Court and commented—

"…we would have to pay close attention to adequate resourcing in order to protect the model. We would need to ensure that we did not allow decisions to be made—as Sandy Brindley said—that create efficiencies in the system but have extraordinarily harmful impacts on victims and survivors."

828. In evidence to the Committee, the Cabinet Secretary highlighted the increase in the budget allocated to the Crown Office and Procurator Fiscal Service in the current draft budget and noted—

"Inevitably, there will be costs, and we will look at that issue constantly from now until implementation because, as we know, costs can change. In the longer term, there are potential savings to be had with the more efficient use of court resources. Indeed, we have already seen in other courts in the system the benefits of really good judicial case management."

Court estate

829. Another issue relating to resources which was raised with us was the utilisation of the court estate to allow for the introduction of the new court.

830. The Financial Memorandum explained that it was not anticipated that new court buildings would be needed for the Sexual Offences Court. Instead "…the model of specialist court provided for by the Bill is intended to facilitate a more flexible use of the existing court estate as well as of other court and judicial resources".

831. The Bill does not include any specific provisions about where the Sexual Offences Court must sit, beyond the general provisions that—

- "More than one sitting of the Sexual Offences Court may take place at the same time, and at different places"; and
- "Sittings of the Sexual Offences Court may be held at any place in Scotland."

832. Lady Dorrian explained the thinking of her review group in this regard. She told us—

"My idea throughout was that we would be able to utilise to a much greater extent all the resources across the estate and that we would be able to spread those cases so that they could be dealt with more locally. Local justice is an important issue."

833. David Fraser from the Scottish Courts and Tribunals Service commented that—

> "One of the key things that the new specialist sexual offences court will give us is that it will sit in a vastly increased number of locations in comparison with where the High Court currently sits."

834. Lord Matthews pointed out that "a court with national jurisdiction that is separate from the High Court should be able to make greater and more efficient use of the court estate and the judiciary".

835. □ate Wallace of Victim Support Scotland told us, however, that "it is just the nature of the court estate that some of its buildings are really not conducive to a trauma-informed approach".

836. A similar point was made by Sandy Brindley of Rape Crisis Scotland. She noted, for example, concerns about common entrances where complainers risk meeting the accused and told us about instances of complainers having to meet the advocate depute in a corridor before giving evidence.

837. However, she indicated that—

> "I understand the rationale for talking about local justice. It does not make sense for somebody from Orkney, for example, to travel a huge distance to a national court."

838. The Cabinet Secretary acknowledged that "the fabric of the court estate is a fundamental issue" but noted that the Scottish Government is committed to continuing to make improvements to the court estate.

839. She noted that in the Scottish Government's draft budget there is a 9.5 per cent increase in resource funding for courts but a capital funding increase of 28 per cent, a figure she described as a "significant uplift".

840. The Cabinet Secretary also commented on the suggestion that the Sexual Offences Court will be able to sit in more locations—

> "The advantage of the national jurisdiction aspect is that the sexual offences court will be able to sit in nearly 40—that is, 39—court facilities around the country, so it will have a presence in localities that are nearer to local justice, whereas the High Court can currently appear in only 10 locations. I contend that, given where this court with national jurisdiction can appear, it is in line with trauma-informed practice."

Pre-recorded evidence

841. According to the Policy Memorandum, the Bill provides that the Sexual Offences Court must enable all of a vulnerable complainer's evidence to be given in advance of trial by the use of special measures.

842. The Policy Memorandum notes that—

> "Exceptions to this general rule are provided where the court is satisfied that pre-recording evidence would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice or that the complainer expresses a wish to give evidence at the trial."

843. The proposals in the Bill seek to build on the experience of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019. This Act provides for an expansion of pre-recorded evidence from child and 'deemed vulnerable' witnesses in serious cases by, in effect, providing for a presumption in favour of pre-recording their evidence.

844. The Policy Memorandum referred to the Scottish Courts and Tribunals Service's 'Evidence and Procedure Review', which had considered the use of pre-recorded evidence in other jurisdictions. The review found that permitting vulnerable witnesses to pre-record their evidence reduces the stress associated with giving evidence in front of a jury and also supports witnesses to provide their best evidence by enabling them to provide a more contemporaneous and accurate account.

845. Lady Dorrian commented that—

> "Pre-recording is the single most effective measure, whether it is done by commission, or preferably at an earlier stage by pre-recording police interviews, to enable the witnesses to give their best evidence."

846. Lady Dorrian referred to a High Court of Justiciary Practice Note on the taking of evidence of a vulnerable witness by a Commissioner which was designed to encourage greater use of commissions. She told us that the number of applications for commissions had increased from 33 in 2017 to 750 in the year to November 2023.

847. She made the point that the experience of commissions is that the evidence received is much more focused, because there is no jury. She noted that at the time of the publication of her report, commissions took about half the time it took for a witness to give evidence in court, and they may be even quicker now.

848. She commented that in relation to pre-recorded evidence "the timing is the key thing—it should be done at a much earlier stage".

849. Danielle McLaughlin of the Scottish Courts and Tribunals Service told us that—

> "Commissions can take an average of 16 weeks from the start of a High Court trial, and the latest data from SCTS shows that the wait from preliminary hearing to trial is 49 weeks. This change would reduce a complainer's waiting time to give evidence by 36 weeks."

850. Sandy Brindley of Rape Crisis Scotland told us that she welcomed the presumption for complainers to pre-record their evidence but sounded a note of caution. She referred to the evidence the Committee heard from survivors who had felt under pressure to use special measures and had not been listened to when they expressed a contrary view.

851. In this regard, Sandy Brindley noted that the Bill permits complainers to give live evidence in the Sexual Offences Court but only if the court is satisfied that "it would be in the vulnerable complainer's best interests to give evidence at the hearing". She noted that no details are given about what "best interest" means and she commented—

> "I caution against paternalism in the name of protection if it removes control and agency."

Pre-recorded evidence and conviction rates

852. Another issue raised with us about the use of pre-recorded evidence was whether the particular format of the evidence might have an impact on conviction rates.

853. In particular, some witnesses referred to an analysis undertaken in England and Wales by the UCL Jury Project of so-called 's28' evidence in the Crown Court from June 2016 to June 2023. "s28" refers to the provisions in the □outh Justice and Criminal Evidence Act 1999 which established the legal basis for the use of pre-recorded cross examination in England and Wales.

854. In a written submission to the Committee, Professor Cheryl Thomas (the director the UCL Jury Project) explained that—

"The main finding from this analysis is that conviction rates for every single offence are lower when s28 evidence is used then when it is not used. This is

- regardless of whether the s28 witness is a child/vulnerable or an adult/intimidated□
- regardless of whether the s28 witness is female or male□or
- regardless whether the offence is a sexual offence or a non-sexual offence."

855. When Professor Cheryl Thomas gave evidence, she told us that in England and Wales—

> "Concerns had been expressed by both the judiciary and the legal profession about the impact of the main complainant's evidence all being pre-recorded, and our analysis showed that there are consistently lower jury conviction rates when that happens. I am just sharing that with you, because the use of pre-recorded cross-examination is part of the bill. It might be something that you wish to consider."

856. The findings of the UCL Jury Research was mentioned by Sandy Brindley of Rape Crisis Scotland who told us—

> "I was concerned by those findings. I have heard concerns from prosecutors for years, anecdotally, about evidence that is not live having less impact on juries in rape cases when the accused is directly there, beside the jury."

857. She noted that an evidence review had been commissioned by the Scottish Government, and it appeared to find that pre-recorded evidence did not make a

difference to the outcomes of trials. However, she commented that she would like to see some Scotland-specific research because "even if there is just a slight correlation, the key is to have informed choices for complainers".

858. The evidence review referred to by Sandy Brindley was 'The Impact of the Use of Pre-recorded Evidence on Juror Decision-Making: An Evidence Review' which was undertaken by Professor Vanessa Munro of the University of Warwick in 2018.

859. When Professor Munro gave evidence to the Committee she commented that the format for the pre-recorded evidence in England and Wales is quite different from the one used in Scotland. She also noted that there have been substantial problems with the technology, which makes it quite difficult to disentangle how much of an impact those factors are having on the reception of that pre-recorded evidence and on the outcomes of trials. She commented—

> "To reduce any negative impacts that are associated with bad tech, a specialist court requires resourcing to have high-quality appropriate technology for such measures."

860. We asked Lady Dorrian if there was evidence that evidence by commission is not as robust as evidence gathered in another way. She responded—

> "No—I have heard that canard on a number of occasions and it is just incorrect. There is evidence, which we refer to in the report, to show that it is incorrect.

861. She referred to the arrangements for virtual trials during the COVID pandemic and noted that for three years, there were trials in which juries saw no live witnesses at all. She commented that "conviction rates over that period were not, in any way, incomparable to conviction rates prior to that period".

Delegated powers

862. The Delegated Powers and Law Reform Committee raised one issue relating to the procedure of the Sexual Offences Court in its letter to the Committee.

863. As we have discussed, the procedure in the Sexual Offences Court is intended to mirror that of the High Court other than where the Bill makes provision to the contrary or when bespoke court rules and procedures are made in future.

864. However, section 55(2) of the Bill provides that the Scottish Ministers may, by regulations, make further provision for the procedure which applies to proceedings in the Sexual Offences Court. Before making such regulations, the Scottish Ministers must consult the Lord Justice General. Regulations made under this power may modify any enactment, including the Act that flows from this Bill.

865. According to the Delegated Powers Memorandum published by the Scottish Government, this is required in order that further provision about procedure can be made where any inconsistencies or ambiguities arise. However, the Delegated Powers and Law Reform Committee asked whether any consideration had been

given to alternative drafting which would limit the use of the power to provisions dealing only with 'inconsistencies and ambiguities' rather than making any substantive change to procedure.

866. In her response to the Delegated Powers and Law Reform Committee, the Cabinet Secretary argued that the powers to make regulations set out in the Bill were required. She wrote—

> "I do not think it prudent to restrict the regulation making power only to 'inconsistencies or ambiguities', recognising that there is a degree of subjectivity inherent in those terms. As we don't yet know what changes might be needed, we cannot with confidence characterise these as 'inconsistencies or ambiguities'."

867. In its report on the Bill, the Delegated Powers and Law Reform Committee considered "it would be appropriate if the power was limited in such a way that substantive changes to criminal procedure could not be made using this power". It therefore made the following recommendation—

> "The Committee acknowledges that it may be helpful to have a power to make further provision about criminal procedure in order to deal with unforeseen inconsistencies and ambiguities. However, it considers that the power, as currently drafted, is broader than necessary and therefore calls on the Scottish Government to bring forward an amendment at Stage 2 which would limit the scope of the power."

Conclusions and recommendations

868. One of the most significant changes proposed in the Bill is the proposed establishment of a new Sexual Offences Court. Whilst this would not be a new building, it would be a new specialist court to deal with serious sexual offences.

869. In reaching a view on this Part of the Bill, we will first discuss, in general terms, whether the model of establishing a new court appears to be the right one for dealing with serious sexual offence cases. In other words, could the model of a new court potentially deliver advantages which other approaches would not? We will then discuss some of the details of the proposal.

870. It was Lady Dorrian's review group which recommended the creation of a new court. Their view was that a new court would allow trauma-informed practice to be fully embedded in its practices. Furthermore, common training could be provided to all those working in the court. A new court would also bring together all solemn level sexual offences in one court which would, amongst other benefits, enhance consistency in how such offences are treated. The potential advantages of a new court were supported by various witnesses.

871. On the other hand, some other witnesses, including representatives of the legal profession, felt that these benefits could just as easily, and potentially more quickly, be achieved by establishing specialist divisions within existing

courts. The Faculty of Advocates said that "there is no single feature of the proposed court which could not be delivered rapidly by introducing specialism to the existing High Court and Sheriff Court structures". However, Lady Dorrian told us that her review group felt quite strongly that such a model would not, as she put it, "achieve the necessary end". Furthermore, the Lord Advocate commented that existing initiatives had "not shifted the dial" on the problems faced by complainers and noted that, in her view, a new court would bring positive, radical change.

872. We note these general views on the principle of a new Sexual Offences Court. However, before taking a view on whether to support the proposal in Part 5, it is important to examine the details of how the new court is intended to operate, with reference to the specific provisions on the face of the Bill. Our view is that these details matter. This is because one of our key objectives is to ensure that there is no perception that the Sexual Offences Court lacks seriousness or solemnity when compared to the High Court. This was one of the particular concerns highlighted to us by survivors. Put simply, we do not want the new court to feel like it is a 'downgrade', given the seriousness of the crimes which it will hear.

873. Another point we must consider is that the Bill departs from the model proposed by Lady Dorrian in several key areas. In our view, it is important to understand why this is the case and, again, to be reassured that any divergences in approach will not have the effect of downgrading the status of the court.

874. The first specific point to highlight is about rights of audience, namely who is able to represent a person in court proceedings.

875. As we have discussed earlier in the report, Lady Dorrian's review group recommended that rights of audience in the Sexual Offences Court should be limited to advocates and solicitor advocates, as is the case in the High Court. However, the Bill takes a different approach and would, additionally, allow solicitors rights of audience in the new court, except for cases involving rape or murder.

876. The rationale for the Scottish Government's position is that the new court will include offences previously heard in sheriff and jury courts, where solicitors currently have rights of audience, and there would not be the required numbers of advocates and solicitor advocates to hear all these cases. Furthermore, the argument has been made that allowing solicitors to deal with cases in the new court would allow them to build their skills and expertise in dealing with serious sexual offence cases.

877. Some organisations raised concerns about this approach, on the basis that it departed from Lady Dorrian's vision for the new court and, in their view, would give the court a downgraded status compared to the High Court. There was also concern about the idea of solicitors using the new court to develop their expertise, given the seriousness of the cases being heard.

878. We have carefully considered these points. We note the reasons why the Scottish Government is proposing the approach taken to rights of audience in the Bill. Our view is that, in establishing the Sexual Offences Court, the general principle should be adopted that cases which would previously have been heard in the High Court should attract the same level of representation when heard in the Sexual Offences Court. The Committee believes that this point should be set out on the face of the Bill and invites the Scottish Government to set out its views on this matter.

879. On this subject, we heard about one specific point about rights of audience on which we believe further thinking is required. It is currently the case that the High Court will in practice deal with some serious sexual offence cases which do not include a charge of rape. Representation in such cases would be at advocate or solicitor advocate level. However, under the Bill, in the Sexual Offences Court these same cases could be represented by a solicitor. To our mind this seems to be a discrepancy which requires to be addressed. In this regard, the Cabinet Secretary has indicated that she is working to develop a mechanism to identify such cases and make them eligible for legal aid for advocates or solicitor advocates. She is also exploring whether this mechanism can be included in the Bill. We would be supportive of this initiative. Accordingly, we recommend that the Scottish Government amends the Bill in this way at Stage 2.

880. So far, we have discussed rights of audience for the defence. However, there have also been concerns expressed by some in the legal profession that procurator fiscal deputes could end up prosecuting rape cases in the new court rather than advocate deputes. On this point, the Scottish Government's position is that the independence of the Lord Advocate means that Parliament cannot place restrictions on those who prosecute on her behalf. The Bill is therefore silent on this matter. However, we welcome the comments from the Lord Advocate that "for the special sexual offences court, from my perspective I do not see it being anyone other than an advocate depute prosecuting, with extended rights of audience". Whilst respecting the independence of the Lord Advocate in this respect, the Committee welcomes this statement, and believes this should be implemented in the future. The seriousness of the cases that will be tried in this new court demands, in our view, the most experienced prosecutors.

881. The second point where the Bill departs from the recommendation of Lady Dorrian's review group is the proposal that, in addition to a relevant sexual offence, the new court could hear any other charges that appear on the same indictment, including murder. Lady Dorrian's review group took the view that murder should be tried solely in the High Court on the basis that it is the most serious crime. This view was shared by her personally along with various other individuals and organisations, including the Senators of the College of Justice and representatives of the legal profession.

882. We understand the Scottish Government's position is that the new court should be able to hear murder charges in order to accommodate a scenario in which sexual abuse by the accused is alleged to have escalated over time against multiple complainers, ultimately leading to a murder. The Scottish

Government also notes that, ultimately, the Lord Advocate would have discretion on whether to prosecute a case in the Sexual Offences Court or elsewhere.

883. Nevertheless, we have concerns about the prospect of the Sexual Offences Court hearing murder cases, not least because the Senators of the College of Justice did not consider that there would be many cases of the kind described by the Scottish Government. We share the view that the High Court is the most appropriate court for murder cases to be heard due to the seriousness of the offence. Furthermore, we are concerned that proposals in the Bill could, in theory, lead to a scenario in which a murder charge is heard in the Sexual Offences Court on the basis of a sexual offence charge on the indictment, but that charge is subsequently dropped, leaving the new court to proceed with the murder charge alone. This, to us, does not seem like a satisfactory outcome.

884. For these reasons, we do not think that a strong case has been made that the Sexual Offences Court should be able to hear murder cases. We recommend that the Scottish Government amends the Bill so that any case involving murder is tried in the High Court.

885. The third area where specific concerns have been raised about the details of Bill relates to the appointment of judges of the Sexual Offences Court. Several specific practical questions about the proposed appointment process have been raised by the Sheriff and Summary Sheriffs' Association. We invite the Scottish Government to respond to the issues they raised.

886. We wanted, however, to comment on one specific area raised in evidence to us. That is, the process for removing judges from the Sexual Offences Court. The Bill provides that Lord Justice General can remove a judge from the court without any reason, though not from the office which that judge held prior to appointment to the Sexual Offences Court. A concern highlighted to us was that these arrangements could constitute interference with a judge's security of tenure, with knock-on implications in respect of the ECHR article 6 right to a hearing by an independent and impartial tribunal established by law. Views differed as to whether this was an issue of concern or not. The Scottish Government has indicated it is looking to bring forward an amendment in this area.

887. The fourth point we want to raise is about the resourcing of the new court. We heard evidence that if the model envisaged for the new court is to meet its full potential, then adequate resources will be required. However, the full cost of this has not yet been quantified. A particular concern for us is the condition of some of the existing court estate, given that no new court buildings are planned. It is envisaged that the Sexual Offences Court will be able to sit in many more locations than the High Court, which the Cabinet Secretary said can currently sit in 10 locations. The figure of 39 locations was mentioned. This would have the advantage of promoting 'local justice'. However, we would want to be reassured that any venue in which the new court sits will be capable of being adapted to trauma-informed practice. For example, some survivors highlighted to us the importance of the availability of separate entrances for complainers and the accused, and separate public spaces during any breaks in

the trial. Furthermore, we would want to be reassured that the use of, for example, sheriff court facilities to hear cases which might previously have been heard in the High Court, would not affect the status of the court in the eyes of the public. The nature of court facilities can have an impact on how that court is perceived.

888. Finally, we have some comments on the procedures of the new court. We have already recommended, in the section of our report on Part 2 of the Bill, that the use of floating trials should be kept to the absolute minimum that is required, and that we see this as being a particular priority in the Sexual Offences Court.

889. We welcome the provision in the Bill that the new court must enable a vulnerable complainer's evidence to be given in advance of trial by the use of special measures. However, we understand that the Bill only permits complainers to give live evidence in the Sexual Offences Court if the court is satisfied that it would be in their best interests. We recommend that this provision should be amended to allow complainers more of a choice in this matter. This would be in line with views we heard from survivors that the justice system should be more responsive to individuals' preferences.

890. On the question of special measures, we note the University College London research conducted in England and Wales that conviction rates are lower when a complainer's evidence is pre-recorded. While, on the face of it, this is a concern, it is not clear to what extent, if any, this research might be applicable to the use of pre-recorded evidence in the Scottish justice system where different arrangements apply. It is difficult for the Committee to fully assess the validity of this proposal due to a lack of Scottish-specific research which we believe is required.

891. Having taken into account the general views we heard on the proposal for a new Sexual Offences Court and examined the details of how it will operate, we have reached the following conclusions.

892. All Members agree that more needs to be done to improve the experience of victims and witnesses in relation to sexual offences. The Committee agree that reforms, some of which are covered elsewhere in this report, such as independent legal representation for complainers in rape cases, a single point of contact for complainers and a pre-meeting with a prosecutor are key. Some of these can be achieved without legislation and should be pursued as a matter of urgency.

893. Some Members[17] support the proposals in the Bill for a new Sexual Offences Court. For those Members, the model of a new Sexual Offences Court has the potential to deliver a degree of improvement in the handling of sexual offence cases which cannot be realised using existing mechanisms. Those Members encourage the Scottish Government to take the necessary

[17] Audrey Nicoll MSP, Rona Mackay MSP, Fulton MacGregor MSP and John Swinney MSP.

steps to address the concerns outlined in this report regarding the status of the new court.

894. Other Members[18] do not support the proposals for a standalone sexual offences court. Their view is that it would be possible to achieve the necessary improvements and address concerns raised by some elsewhere in this report through the creation of specialist divisions of the High Court and Sheriff Court. For them, a new specialist court will not in itself achieve a meaningful improvement to the experience of victims.

[18] □aty Clark MSP, Pauline McNeill MSP, Sharon Dowey MSP and Russell Findlay MSP.

PART 6: ANONYMITY FOR VICTIMS

Provisions in the Bill

895. The Bill proposes to provide automatic statutory protection for the anonymity of victims of a wide range of sexual and related offences, such as human trafficking.

896. The Bill would generally prevent any publication as defined in the Bill from including information likely to lead to the identification of a person as being a victim of a relevant offence.

897. The right to protection would not be dependent upon any proactive steps by the victim such as reporting the matter to the police.

898. The Bill proposes that the right to anonymity would be lifelong, ending upon the death of the victim.

899. A failure to comply with the restrictions on publishing information would be a criminal offence. This would be subject to certain defences, for example that the information is already in the public domain.

900. An adult victim would be able to give third parties (such as a newspaper) permission to publish information. Where the victim is still a child (under 18 years old), the victim's consent would not be sufficient. The matter would have to be considered by a court.

901. However, the restrictions on publication would not prevent a victim of any age publishing information likely to identify themselves, for example publication on social media.

Background

902. At present, unlike in many other countries, in Scotland there is no automatic legal right to anonymity for adult complainers in sexual offence cases.

903. Although a court can make an order to expressly prohibit the publication of details of complainers in sexual offence cases, this does not happen automatically. Instead, for the majority of cases, a long-standing non-statutory convention is relied upon that the mainstream media will not name complainers.

904. The Editors' Code of Practice, published by the Independent Press Standards Organisation, states that—

> "The press must not identify or publish material likely to lead to the identification of a victim of sexual assault unless there is adequate justification and they are legally free to do so. Journalists are entitled to make enquiries but must take care

and exercise discretion to avoid the unjustified disclosure of the identity of a victim of sexual assault."

905. It is therefore the case that when the media and others refer to complainers 'waiving their right to anonymity' in order to speak publicly about their experiences, this 'right' does not, in fact, exist in law.

906. The report of Lady Dorrian's review group addressed the question of the anonymity of victims of sexual offences—

> "The rise of "new" or "citizen" journalists, and the vast increase in the use of social media, suggest that the tools hitherto relied upon in Scotland are no longer adequate and that legislation is required to ensure the adequate protection of the identities of complainers making allegations of rape and sexual assault. The introduction of legislation providing anonymity to such individuals is accordingly recommended."

907. When she gave evidence to the Committee, Lady Dorrian explained that—

> "In order to provide a real safeguard against the risk of inadvertent disclosure by a professional or mischievous disclosure by a non-professional, we felt that that protection should be made clear in statute."

908. The Policy Memorandum explained the objectives of the proposals in the Bill—

> "The benefits of this change will be to maintain as best as possible the dignity and privacy of a person when they are a victim of a qualifying offence during their lifetime, which is helpful to the well-being of the individual in itself. This may also, as a secondary benefit, help increase the confidence of victims to report offending behaviour to the police through certainty of their legal right to anonymity."

909. There are some anonymity provisions already in place which apply to children in Scotland. The Criminal Procedure (Scotland) Act 1995 gives all children who are accused, complainers and witnesses automatic anonymity protection in respect of newspaper reports and sound and television programmes. However, these provisions do not apply to individuals making information public, including on social media.

910. The Policy Memorandum explains that the Scottish Government was proposing to make separate reforms to anonymity provisions for children—

> "Reforms to anonymity with regards child accused, complainers and witnesses in general terms i.e. not specific to sexual offences, are being taken forward separately through the Children (Care and Justice) (Scotland) Bill, introduced to the Scottish Parliament on 13 December 2022."

Views on the proposals on anonymity

911. There appeared to be broad support for these provisions in the Bill from a range of organisation and individuals.

912. A written submission from Edinburgh Rape Crisis Centre noted, for example, that it was "strongly in favour of the introduction of automatic life-long anonymity for victims of sexual offences".

913. A point was made in the written submission from the British Psychological Society that—

> "The rights and freedoms of victims are affected should their name become released into the public domain. This can lead to social stigma, re-traumatising as well as act as a barrier to justice."

914. We also heard from Dr Andrew Tickell and Seonaid Stevenson-McCabe from Glasgow Caledonian University. They explained about their work on the Campaign for Complainer Anonymity project, which aims to research international best practice on reporting restrictions for complainers in sexual cases, public attitudes to complainer anonymity in Scotland, and to raise awareness of the need for reform.

915. They noted in their written submission that they shared the findings of their research with the Scottish Government at an early stage in the policy development of this aspect of the Bill.

916. Dr Tickell was asked for his view on the proposals in the Bill, and he commented—

> "They are very good—extremely positive—in general. There might be some areas of continuing controversy, which we can discuss, but, overall, I think that the provisions reflect the best lessons from international practice, which is what we were aiming for as a result of the project."

917. His colleague Seonaid Stevenson-McCabe noted that the definition in the Bill of publication covers "any speech, writing, relevant programme or other communication in whatever form", and she commented "I think that the bill deals with the point about social media very well".

918. As Dr Tickell alluded to, there were some comments about some of the specific details of the proposals on anonymity in the Bill.

919. We discuss the main points which emerged below.

Posthumous anonymity

920. As we have noted, the Bill proposes that the right to anonymity would be lifelong, ending upon the death of the victim.

921. The Policy Memorandum explained the reason why the Bill adopted this approach—

> "…it is the Scottish Government's view anonymity expiring upon death is the preferred approach, providing simplicity and certainty for the victim during their lifetime while also representing a natural end point."

922. The Policy Memorandum also noted there was an argument that extending anonymity beyond death might result in surviving family members and others being subject to court processes and restrictions on reporting where the victim dies in the course of or aftermath of a sexual assault.

923. However, we heard some views which suggested that anonymity for victims (eg to protect surviving family members) should continue to apply after the victim's death.

924. The written submission from Beira's Place made the point that this would be in line with trauma-informed practice. The written submission commented—

> "Trauma is not only personal - it is also interpersonal and intergenerational. As a result, we believe that, if anonymity ceased to apply following a victim's death, this could potentially have unforeseen consequences for significant people in their close environments who might outlive them."

925. Some of the survivors who gave evidence to us indicated that they had concerns about anonymity ceasing on the death of the victim. Witness 1 told us—

> "Let's not just copy every other system with lifelong anonymity. Why don't we do something new? I know that it's difficult and could be contentious but, if you have anonymity, should that be taken away straight away if you die? For me, that is quite an important topic."

926. Sandy Brindley of Rape Crisis Scotland explained that her organisation's views had shifted somewhat on this subject, having spoken with survivors of sexual offences—

> "One issue in relation to anonymity that we found very difficult was when it should end. The Government has gone down the road of it ending upon death, and we have come, on balance, to recognise the reasons for that. However, I have subsequently had conversations with rape survivors who have expressed strong views on the issue. They have asked, "Why should my protection end when I die, and what about my family?" We would certainly be willing to shift our position if the committee were to look at the feasibility of extending that protection beyond death."

927. □ate Wallace of Victim Support Scotland argued that anonymity should be extended beyond death and noted the impact on surviving children, who by default are also identified when a parent or carer is killed. However, she considered there should be provision for victims or their families to waive their right to anonymity.

928. The written submission from the Law Society of Scotland argued that "anonymity should continue in perpetuity, rather than end at death, if the principle behind anonymity is to preserve the complainer's dignity". The submission suggested that should another person wish to name a complainer of a sexual offence after the

complainer's death, then application could be made to the court outlining the justification for setting aside the right to perpetual anonymity and seeking the court's approval to do so.

929. The written submission from Dr Andrew Tickell and Seonaid Stevenson-McCabe commented that they supported the approach in the Bill —

> "We support this approach. First, it is consistent with the general legal principle than an individual's privacy and reputational rights extinguish at the end of their natural life and are not transferable. Our research suggests most comparator jurisdictions with similar reporting restrictions limit their application in this way. This approach gives journalists, court reporters, writers, biographers and historians legal certainty that if they write about a deceased person, they are not at risk of committing a criminal offence under the legislation."

930. We note that a specific issue has arisen in respect of the Children (Care and Justice) Bill relating to the end point for anonymity for child victims and whether it should extend beyond their natural life.

931. This is something which has been raised with the Education, Children and □oung People Committee which is lead committee on the scrutiny of that Bill. This is a matter for that committee to pursue. We note that the Scottish Government arranged a roundtable discussion on 20 February 2024 with representatives from victim support organisations, academia, the legal profession, the criminal justice agencies and media organisations, to discuss matters further.

932. The Cabinet Secretary commented on this issue when she gave evidence—

> "The starting point is that a person's general data protection regulation rights to privacy expire on their death. Therefore we are not talking about changing or making a wee tweak in one bit of legislation. However, we have started the process of considering the matter, following representations that I and others have had from victims organisations. I have also discussed it with Dr Andrew Tickell, whose evidence the committee has heard."

Decision to self-publish

933. One issue which was raised with us by the survivors who gave evidence was the right of individuals to decide whether to make their own experiences public.

934. Hannah McLaughlan commented, for example—

> "When the question was put as to whether the bill goes far enough, I was struck, as a survivor who went public afterwards, by the fact that, while the bill contains a right to lifelong anonymity, we are still missing something. Not all survivors will keep their anonymity. What about those survivors who go public? There are three of us sitting here, and there are many others."

935. The Policy Memorandum explained that there was a dual purpose to the proposals around anonymity, namely to provide protection to those who wish to remain anonymous—

> "…while at the same time recognising and preserving their autonomy and 'right to be heard', should survivors wish to speak publicly about their lived experiences."

936. The Policy Memorandum went on to state that this will be achieved by ensuring complainers, adults or children, are not criminalised for unilaterally self-publishing their story if they wish to, while also providing a process through which third party publishers may do so on their behalf.

937. Seonaid Stevenson-McCabe of Glasgow Caledonian University told us that she welcomed the approach taken in the Bill—

> "It is important that survivors can speak out. When Hannah McLaughlan spoke to the committee, she said that we should not be pushing for everyone to remain anonymous. That is absolutely not what we want to do with this campaign, and I am heartened to say that it is not what the Government wants to do with the bill, either. We want survivors to have the choice□how it is made should, of course, come down to the individual survivor."

Public domain defence and application to child victims

938. One specific issue which emerged during evidence was highlighted in the written submission from Dr Andrew Tickell and Seonaid Stevenson-McCabe. It raised the possibility that—

> "As drafted, the Bill would criminalise a family member, friend – or stranger – who shared a child victim's social media post disclosing they were the victim of a sexual crime. They would not necessarily benefit from the public domain defence already discussed – as this is only available if the publisher has "no reason" to believe the complainer is under 18 years of age."

939. In evidence to the Committee, Seonaid Stevenson-McCabe noted that in practice police and prosecutorial discretion may be used in some such cases so as to not prosecute (e.g. where information was further shared by a well-meaning family member). However, she noted that "on a black-and-white reading of the law, the current position is that it could be a criminal offence".

940. In supplementary written evidence following their appearance, Dr Andrew Tickell and Seonaid Stevenson-McCabe indicated that they had reflected further on these particular provisions, and wrote—

> "…we now think the defence as framed in the Bill could arguably be available to a third party who shared a child victim's own social media content about sexual offences.
>
> Section 106F(4)(b) of the Bill provides that it is only where the information is in the public domain as a result of being published by a person other than the person to whom it relates (i.e. someone other than the child victim), that the conditions in subsection (3) become relevant. Therefore, if a family member – or a news outlet – was to share a child's own content, they would not need to show that they had no reason to believe that the written consent was not in place or

> that the child was under the age of 18 and could share the relevant content without facing criminalisation."

941. Despite their updated evidence on what the provisions currently set out in the Bill might actually mean, it would appear that the policy intention of the Scottish Government is that the public domain defence should not apply where the information was made public by a child (e.g. see paragraph 467 of the Bill's Policy Memorandum). However, we note that there could be scope for clarifying both the policy and provisions of the Bill in this area.

942. Dr Andrew Tickell and Seonaid Stevenson-McCabe have also highlighted the importance of the provisions in the Bill aligning with the Children (Care and Justice) (Scotland) Bill, which includes similar provisions for a public domain defence for third parties who share content created by child publishers.

943. On the subject of safeguards for children, Dr Tickell raised a point about the decision to set the age at which additional safeguards are provided for in the Bill as being 18. He commented that—

> "We certainly recommended that you should take more evidence on the issue. As we have seen in a range of different criminal justice contexts, there is a degree of incoherence in our thinking about age thresholds."

Scope of provisions

944. We heard some views about whether the list of offences which will attract anonymity was extensive enough.

945. The Policy Memorandum explained that in addition to the prescribed sexual offences/offences with a significant sexual element, the Bill also includes the offences of human trafficking, modern slavery, servitude and forced or compulsory labour, female genital mutilation (FGM), virginity testing and hymenoplasty as offences within the scope of the anonymity protections.

946. The list of relevant offences is set out in the inserted text in section 63(2) of the Bill. The list is fairly extensive, but some organisations have expressed concern that it does not include offences such as stalking and domestic abuse.

947. The written submission from Rape Crisis Scotland commented—

> "We support that the right to anonymity should exist in all the offences covered within the Bill but submit that there should be a 'catch all' provision. This should include a right to anonymity where the offence has a significant sexual element, even if that offence is not specifically named on the list…We see the Bill in its current form may not protect the anonymity of some survivors of sexual violence and we think this would ensure absolute protection."

948. In their supplementary written evidence, Dr Andrew Tickell and Seonaid Stevenson-McCabe addressed this point. They noted that in England and Wales a campaign has called for existing anonymity provisions to be extended to cover domestic abuse.

949. Their submission commented that—

> "…domestic abuse cases which involved a sexual element would be captured by the proposed reporting restrictions, while cases characterised by violent, threatening or coercive controlling behaviour would not. This creates a potential discrepancy in the framework."

950. However, they highlighted the potential difficulties in extending anonymity provisions to all domestic abuse cases, namely that this is likely to involve anonymising the accused person to avoid jigsaw identification of the victim given that domestic abuse offences are relationship-based.

951. On this subject, the Policy Memorandum is clear that—

> "It is not the Scottish Government's intention to extend the anonymity provisions to accused persons in law, which involve distinct and different underlying policy rationales."

Anonymity if acquittal

952. The Crown Office and Procurator Fiscal Service raised some concerns in its written submission that the Bill is "not clear" if the anonymity provisions would apply to the complainer in a sexual offence case where there has been an acquittal. It referred to the wording of the Bill which states, in inserted text in section 63(2), that—

> ""victim of an offence" means a person against or in respect of whom an offence has been, or is suspected to have been, committed."

953. The Crown Office and Procurator Fiscal Service submission raised a scenario in which the accused is acquitted after a trial, and commented—

> "…in these circumstances there has been a formal determination following court proceedings that the accused did not commit the offence. It is submitted that the provisions should be amended to ensure that the protection available to individuals is not conditional on the outcome of court proceedings."

954. We asked the Lord Advocate whether the Crown Office and Procurator Fiscal Service had been in discussion with the Scottish Government about this point. The Lord Advocate told us—

> "□es, it has. It has taken on board a lot of the issues that we raised and is considering the point. The matter is not being ignored and is being worked on. □ou can see the logic in remedying the deficiency."

955. The Lord Advocate indicated that she anticipated there would be an amendment from the Scottish Government on this issue.

956. The written submission from Dr Andrew Tickell and Seonaid Stevenson-McCabe from Glasgow Caledonian University appeared to offer some reassurance regarding the application of the Bill to complainers involved in trials where there had been an acquittal. They commented—

> "There are different ways of describing the people who will benefit from reporting restrictions under the Bill. The Bill is framed in terms of "victims" – though its provisions will apply to cases where there is no prosecution, or indeed where the accused is acquitted of committing an offence against them."

Anonymity for the accused

957. Several written submissions received from members of the public argued that if complainers are to be granted rights to anonymity, they should also be extended to the accused in the interests of fairness.

958. As we have noted, the Scottish Government has stated that it is not its intention to extend the anonymity provisions to accused persons. As such, no proposal to this effect was included in the Bill. Indeed, the proposal was not included in Scottish Government's consultation conducted prior to the introduction of the Bill.

959. We asked Dr Andrew Tickell and Seonaid Stevenson-McCabe for their comments on the views we had heard from some respondents on this topic.

960. Dr Andrew Tickell noted that in the 20 jurisdictions he had examined, anonymity is given to the accused in only 3 of them. These are the Republic of Ireland, Northern Ireland and New □ealand. He noted that in the latter case, this is for the complainer's interest, not for that of the accused.

961. Dr Tickell commented that, when it comes to giving rights of anonymity to the accused "if you look at how that works in practice, you will see that there are substantial problems with it". He gave one example that if there are provisions that someone accused of sexual offending cannot be identified unless they are charged or convicted, it would be a crime for anyone to say that they were sexually abused by Jimmy Savile.

Conclusions and recommendations

962. In Scotland there is no automatic legal right to anonymity for adult complainers in sexual offence cases. Public commentary and media coverage often refers to complainers 'waiving their right to anonymity'. Instead, for the majority of cases, it is a long-standing non-statutory convention that complainers in sexual offences cases are not named in the mainstream media that results in them not being named in those outlets.

963. We share the view of Lady Dorrian's review group, and many others, that these arrangements require to be modernised for the social media age, and additional protections put in place to give complainers confidence that their anonymity will be maintained. This, in turn, may encourage more complainers to come forward.

964. As such, we welcome the proposal in the Bill to provide automatic statutory protection for the anonymity of various sexual and related offences. We also welcome the inclusion of arrangements whereby survivors can decide to self-

publish their story. This is in line with the principle that survivors should have the choice in such matters.

965. Although the provisions in the Bill attracted general support, there were some specific comments on the details which we discuss below.

966. First, the Bill proposes that the right to anonymity for complainers for various sexual and related offences ends on the death of the victim. Some witnesses have called for anonymity to continue after death, not least to provide reassurance for surviving family members. On the other hand, there is an established legal principle that certain rights end with a person's death.

967. Second, we heard calls for the provisions on anonymity to be expanded to cover other offences such as domestic abuse. We have sympathy with this suggestion, but also acknowledge some of the practical implications. In effect, this may mean that anonymity also has to be given to the accused due to the risk of 'jigsaw identification', given that domestic abuse cases are relationship-based. This is not one of the policy objectives of the Bill. We seek clarity from the Scottish Government on whether domestic abuse cases which have a significant sexual element will be captured by the provisions in the Bill.

968. Third, we heard from Dr Andrew Tickell and Seonaid Stevenson-McCabe about the possibility that the Bill as drafted would criminalise a family member (or indeed anyone else) who shared a child victim's social media post disclosing that they were a victim of a sexual offence. The provisions in the Bill in this area are complex. Our understanding is that the Scottish Government's policy intention is that the public domain defence for revealing information should not apply where the information was made public by a child. However, we recommend that the Scottish Government provides clarity on this point and addresses the specific scenario about the potential criminalisation of the family member of a victim which was highlighted to us in evidence (see paragraph 938).

969. Finally, the Crown Office and Procurator Fiscal Service has noted there is a lack of clarity in the Bill as to whether the provisions on anonymity would apply in cases where there has been an acquittal. It appears that the uncertainty arises from the way 'victim' is defined in the Bill. We understand that the Scottish Government is open to an amendment on this point and we recommend that one is brought forward at Stage 2.

970. This is a sensitive issue on which the Committee heard limited evidence, specifically from two witnesses with a specialist interest in this area. In their evidence they raised several issues which could have wider consequences and the Scottish Government should address these points.

PART 6: INDEPENDENT LEGAL REPRESENTATION

Provisions in the Bill

971. The Bill contains provisions about the procedure for sexual offence cases where there is an application under section 275 of the Criminal Procedure (Scotland) Act 1995 to allow evidence concerning the sexual history or character of the complainer.

972. Specifically, if such an application is made, the Bill would give the complainer a right to independent legal representation (ILR). The provisions in the Bill would—

- Require the prosecution to provide the complainer with information on the application to allow sexual history and character evidence
- Allow the complainer to be represented by a lawyer in relation to that application
- Provide for the disclosure of relevant evidence to that lawyer (this would be disclosed by the prosecution following approval by the court)
- Allow the lawyer to make representations to the court on the application
- Allow the lawyer to appeal a court decision, made in advance of the trial, to grant an application.

973. By way of background, section 274 of the Criminal Procedure (Scotland) Act 1995, currently provides that the court shall not allow evidence which shows or tends to show that the complainer—

(a) is not of good character (whether in relation to sexual matters or otherwise)□

(b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge□

(c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer - (i) is likely to have consented to those acts□or (ii) is not a credible or reliable witness□or

(d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.

974. This provision is sometimes referred to as the ‘rape shield’ and the Policy Memorandum explains that—

> "The rule is designed to protect complainers in sexual offence trials from having to give evidence about irrelevant, sensitive and private matters, or being asked distressing questions, when this is not necessary."

975. Section 275 of the Criminal Procedure (Scotland) Act 1995 gives the court the power to allow evidence covered by the above restrictions if it is satisfied that—

(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating - (i) the complainer's character or (ii) any condition or predisposition to which the complainer is or has been subject;

(b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and

(c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

976. According to the Policy Memorandum, the current approach is that complainers can access independent support and advice at any stage of the criminal justice process through a range of specialist support services. However, it noted that—

> "A number of recent high profile cases have called into question the current approach in relation to a complainer's rights and access to legal advice when applications are made under section 275."

977. The Policy Memorandum noted that—

> "Improving the complainer's experience of the criminal justice system in respect of an especially intrusive aspect of criminal prosecution is in line with this aspiration, as set out in the Vision for Justice."

978. The report of Lady Dorrian's review group recommended that—

> "Independent legal representation (ILR) should be made available to complainers, with appropriate public funding, in connection with section 275 applications and any appeals therefrom."

979. This proposal is taken forward in the Bill.

980. The Policy Memorandum states that—

> "It is… intended that complainers will automatically be entitled to fully publicly funded ILR, on a non-income assessed basis, in relation to applications under section 275. Amendments to existing legal aid regulations will make provision for legal aid for ILR, in these circumstances, to be available to all complainers on a non-means tested basis."

Views on independent legal representation

981. There appeared to be general support for the proposals in the Bill to provide independent legal representation for complainers where a section 275 application is made.

982. The written submission from Moray VAWG Partnership stated, for example, that—

> "This is probably one of the most essential elements of the entire Bill. Extant legal protections against the introduction of sexual history evidence are chronically under-employed by COPFS. The best way to fix this, and to support complainers throughout the process, is the introduction of independent legal representation."

983. Sandy Brindley from Rape Crisis Scotland noted that the application of the provisions in section 274 and 275 of the Criminal Procedure (Scotland) Act 1995 can be very complex, and yet complainers might be required to express a view on them without any legal representation. She noted that she had spoken to complainers who had been consulted by the Crown about section 275 applications, however—

> "…the approach that the Crown took in those cases did not enable the complainers to give informed views by any stretch of the imagination. One complainer who I spoke to said that she was very distressed and did not understand what the evidence meant until it came to the trial, when it formed a key part of her cross-examination."

984. The Lord Advocate noted that—

> "The Crown is not the victim's lawyer, and that is part of the fundamental problem. Although we can do some things that are within the concept of the public interest, we cannot do everything that an independent lawyer would be able to do."

985. Lady Dorrian commented—

> "I strongly support the proposal for independent legal representation. In fact, I think that there is an unanswerable case for independent legal representation, given the experience of complainers and our experience over the years in cases in which the Crown did not object to section 275 applications when it was blatantly clear that every paragraph of the application should have been objected to and should have been refused."

986. Lord Matthews commented that from the perspective of the senior judiciary—

> "It is important that the complainer has the benefit of independent legal representation. Apart from anything else, there is not enough communication and the complainer should be given the opportunity to know what the defence is going to say about her."

987. Sheila Webster of the Law Society of Scotland told us that—

> "The Law Society's position is that we are entirely supportive of independent legal representation. There might be questions, including the old question of resourcing and questions on how all the practicalities work, but we are 100 per cent behind the principle."

988. We also heard from representatives of the Faculty of Advocates and the Scottish Solicitors Bar Association that they supported independent legal representation as set out in the Bill.

989. Although there was general support, we heard some specific comments about the practical details of the proposals, which we will discuss below. We also heard some comments that they do not go far enough and should be extended beyond section 275 cases.

Procedures and time limits

Proposals in the Bill

990. The Policy Memorandum explains that—

> "Section 64 inserts a new subsection (4B) of section 275 of the CPSA 1995, which will place a duty on prosecutors to disclose specific information in the case to a complainer's independent legal representative when they are instructed by a complainer in relation to an application under section 275."

991. According to the Policy Memorandum, this is "to ensure the complainer is properly advised and able to make fully informed views about the application". The Policy Memorandum states—

> "The Scottish Government considers that it should be for the court to determine and authorise the disclosure of any additional information. New subsection (4D) therefore places a duty on prosecutors to apply to court before sending any further evidence referred to in, or relevant to the application."

992. The Policy Memorandum also described the proposed changes to the time limits for section 275 applications. It comments that—

> "It is important that the complainer has sufficient time to consider the section 275 application and effectively implement their right to ILR prior to any determination on the application. Where ILR is instructed, the complainer's legal representative should also have adequate time to conduct their duties."

993. At present, the Criminal Procedure (Scotland) Act 1995 requires that section 275 applications are made no less than 7 clear days before the preliminary hearing in High Court cases and in any other case, no less than 14 clear days before the trial diet.

994. The Policy Memorandum explained the changes proposed in the Bill—

> "Section 64(4)(b) amends the time limits so that applications are to be made within 21 days in all cases. In High Court cases, this should be no less than 21 days before the preliminary hearing and in sheriff and jury cases, no less than 21 days before the first diet. In summary proceedings, it should be no less than 21 days before the first intermediate diet, or where no such diet is set, within 21 days of the trial diet. It is considered that 21 days reflects the additional time that will be needed for complainers to instruct a legal representative, seek their advice and for representations to be prepared by the complainer's legal representative."

Views on procedures and time limits

995. We heard some comments about the proposed arrangements for disclosure of relevant information in the case.

996. The written submission from the Crown Office and Procurator Fiscal Service commented on the timescales involved in this process. It stated—

> "Because of the very short timescales involved, in practical terms, COPFS staff may have to start to consider what evidence is relevant and disclosable as soon as a section 275 application is lodged with the court and before it is confirmed that the complainer has instructed an ILR. This would be time and resource intensive and would give rise to unnecessary work but may be required in order to ensure that the complainer's rights are fulfilled if they are not able to find or instruct an ILR until a late stage in the 21-day period."

997. Lord Matthews felt this process could be simplified. He commented that from the perspective of the senior judiciary—

> "We are concerned at the notion that the Crown has to ask the court for permission to disclose evidence to the complainer's representative. That will cause delay. There is no reason why the Crown cannot just do that off its own bat without involving the court."

998. The written submission from the Senators of the College of Justice suggested that the proposed new disclosure arrangements "will prove time-consuming and cumbersome". It commented that—

> "They will create a considerable amount of extra work for the judiciary and support staff, and no doubt for prosecutors and defence lawyers, which will be time-consuming and resource intensive. There is considerable potential for delay and churn of pre-trial hearings unless there are sufficient additional personnel and resources to support this new procedure."

999. The submission from the Senators suggested that it may be more appropriate and proportionate if the scheme required the Crown to intimate to the defence the evidence it proposed to provide to the complainer's solicitor with the onus then being on the defence to state a reasoned objection if so advised.

1000. A similar concern about the disclosure process was raised by Danielle McLaughlin of the Scottish Courts and Tribunals Service who described it as "rather convoluted" and suggested that "it will build in churn and delay for complainers".

1001. We also heard some comments that it was not clear what would happen if a section 275 application was made during a trial. Danielle McLaughlin of the Scottish Courts and Tribunals Service commented—

> "The inference is that we will have to stop and delay the trial for an indefinite period, which will inevitably cause complainers, the accused and all involved in the process concern and delay."

1002. This point was also raised by the Faculty of Advocates in its written submission—

> "It is the experience of Faculty that there are occasions when an application under Section 275 of the 1995 Act requires to be made during the course of the trial diet. It is not clear to Faculty from the terms of the Bill what, if any, consideration has been given to the effect on trial diets if there requires to be a delay for a complainer to obtain independent legal representation."

1003. The written submission from the Senators of the College of Justice also referred to the prospect of a late section 275 application at trial or on commission. It commented—

> "As the provisions are drafted, there appears to be no discretion to the court not to have intimation made by the prosecutor and to hear from a complainer's solicitor following the cumbersome procedures. We consider that this will cause considerable difficulty and delay which will be disadvantageous to a complainer giving evidence at trial (or on commission) potentially having to wait for days in the midst of giving evidence or longer in a commission in which it may not be possible to recommence within a day or two without discharging some other commission hearing/s. "

1004. The submission commented that "our experience suggests that such a delay will cause an extraordinary and unacceptable level of distress to the complainer for what may be of no real advantage". It went on to note that this "would be the very antithesis of a trauma informed approach".

1005. In its written submission, Rape Crisis Scotland raised some general comments about the timescales in the Bill—

> "we suggest the time frame should be wider to allow more time for the survivor to engage with a solicitor. The Bill's suggested timeframe is 21 days, but within that time the Crown will need to inform the complainer and thereafter they will have to obtain and instruct a lawyer and obtain legal aid. We suggest a minimum period of 28 days is a fair time period for this to be completed in... We suggest that a timescale is imposed on the Crown to send the required information to the complainer (within 2 days) to ensure they receive the information straight away."

1006. The written submission from the Faculty of Advocates commented that it "has concerns, however, that the adjusted time limits take no account of the stresses on the reduced defence Bar, both in the Sheriff and High Courts, and the difficulties experienced in complying with the existing time limits". It went on to states that—

> "Faculty suggests that Parliament may wish to consider, if it wishes to amend Section 275B of the 1995 Act, to leave the time limits in place but provide for an administrative adjournment of the next diet should a complainer wish to obtain independent legal representation."

1007. We asked Lady Dorrian about the concern which had been expressed about the disclosure process provided for in section 64 of the Bill. She commented—

> "To some extent, I think that the so-called unforeseen consequences are a result of section 64 of the bill and the way in which it is envisaged that it should operate. On the face of it, it seems somewhat cumbersome and time consuming, and a procedure of that kind may have the sorts of consequences that you are talking about. I would have thought that a much simpler procedure could be developed."

1008. Lady Dorrian also commented on the provisions in the Bill relating to the timings of section 275 applications. She noted that—

> "Section 275 applications are dealt with at preliminary hearings. As long as the notice period is sufficient to enable that still to be done, there is no reason why they cannot continue to be dealt with at the preliminary hearing. It is one hearing, and it takes place anyway as part of the process of the combined ground rules and procedural hearing. There would be an additional voice. A lot of the stuff is dealt with in writing, because a detailed application has to be made. Very often, parties will submit a written note of their views, and the court will then make a determination.

1009. We asked the Cabinet Secretary about some of the practical issues raised about the changes proposed in the Bill. She told us—

> "There are two issues. I note that Lady Dorrian also said that, if people stick to the timescales, there should not be any undue impact from delays."

1010. She went on to comment that Lady Dorrian—

> "…also gave a commentary on the disclosure process, and I note that others shared her views. I confirm that we are looking to use amendments to simplify that area. As envisaged, the process has the Crown Office applying to the court to release information to the victim's representative. That process could be more efficient and abbreviated. There was some suggestion that, bearing in mind the scope of a section 275 application, which is very clear about the evidence to be shared, the Crown Office should not need to go to court."

1011. We also asked the Cabinet Secretary about the scenario in which a section 275 application is made during a trial and the potential for delays if the trial stops. She answered—

> "Some aspects of the issue are about court processes. I have indicated that we will lodge amendments on and around that, but there are other aspects around ensuring that people and resources are available for people to access independent legal representation."

Extent of the provisions

1012. As we have discussed, the provisions in the Bill cover the provision of independent legal representation to complainers in respect of section 275 applications.

1013. We heard some views expressed that the provisions in the Bill should go further in providing independent legal representation or advice to complainers at other stages in the justice process.

1014. The written submission from Rape Crisis Scotland commented, for example, that the provisions in the Bill do not go far enough to protect the rights of complainers. The submission argued that—

> "There should be a right to independent legal advice throughout proceedings within the criminal justice system. We understand that there has been a commitment made to address this in the future, but survivors have been waiting long enough and this Bill could be bolder in this regard."

1015. We have already noted earlier in this report that, if given the choice, Sandy Brindley of Rape Crisis Scotland would rather have legal advice for sexual offence complainers than the creation of a victims commissioner.

1016. When we spoke to survivors, many of them highlighted access to independent legal advice as something which would have made a significant difference to their experience of the justice process.

1017. Witness 1 commented—

> "I would say that independent legal advice would have made things better. That would have covered everything, including ensuring my anonymity... For me, that was the main thing—having somewhere I could go and get that support rather than bumbling through a process where I was a witness to my own crime. I never was a witness when I had independent legal advice□I was a complainant."

1018. Witness 2 told us—

> "I am 100 per cent in favour of independent legal representation. It's baffling that we have got to a stage in Scottish justice where we do not have that. It can be facilitated easily."

1019. Witness 2 made the point that—

> "The Crown doesn't represent you, though—that's the thing. I think there's a misconception in society that the Crown fights for the person going through the case□it is so not like that. The Crown acts in the interests of the state, and then you've got the defence, which acts in the interests of the accused, and then you've got us. We don't have that legal protection.

1020. Witness 4 felt that support was required at an early stage in the process. She stated—

> "I totally agree that advocacy should be from the beginning and certainly not just from the point where your engagement with the court process actually starts, because so much happens before that."

1021. This was also a point which was made by Ellie Wilson, who commented—

> "I think that victims should have access to independent legal representation throughout the entire process. Applying that to section 275 applications only is completely insufficient."

1022. When we met informally with individuals who had a close family member lose their life because of a serious crime, they argued that ILR also needs to be available to the families of deceased victims, whether any of them are formally called as witnesses in a trial or not. They thought ILR could also play a role in supporting families with legal advice when they find themselves classed as witnesses in a trial.

1023. Ronnie Renucci □C from the Faculty of Advocates commented that the Faculty is in favour of wider independent legal representation and stated—

> "I am certainly in favour of it going further than it does at the moment in relation to section 275, but I am not in favour of such representatives taking part in the trial□that is what the Crown is there for…."

1024. Lord Matthews made a similar point that he did not support the idea of a complainer's lawyer being in court during a trial. He commented that prosecution is a function of the state—of the Crown—not of the individual complainer. This view was also expressed by Stuart Murray of the Scottish Solicitors Bar Association.

1025. We asked Lady Dorrian about the suggestion of extending complainers' rights to independent legal representation. She told us—

> "We did consider that. We thought that independent legal representation in relation to section 274 was the critical thing… We felt that the limit of what should happen within the criminal trial was independent legal representation at the section 275 stage, and that anything else was likely to derail the trial, cause additional delay and put out the time limits…."

1026. The Cabinet Secretary gave her views on this subject when she gave evidence—

> "What is currently proposed for independent legal representation has centred around the section 275 process. I am committed to it being implemented in a way that is a foundation for future potential change. Bearing in mind the committee's correct focus on deliverability and implementation, my focus is first and foremost on what is proposed in the bill."

Resources

1027. We heard some views in relation to the resource implications of providing independent legal representation, including that it could be difficult to quantify what they might be.

1028. The Scottish Criminal Cases Review Commission noted in its written submission that it—

> "…would agree with the observation at paragraph 212 of the Financial Memorandum that the legal sector is 'under considerable pressure' and that the provisions in question are 'likely to add to that'."

1029. The written submission from the Law Society of Scotland raised a series of questions about how the proposals would work in practice and the resource implications—

> "Is it intended that representation will be provided by criminal defence solicitors on a legal aid basis? Will such representation only be provided where a Section 275 application has been made in advance of the trial? We are aware of situations where the judge or sheriff may determine that Section 275 issues arise during the course of the trial - is it envisaged that independent representation will be available at every trial to accommodate this possibility? On this approach, we would have concerns regarding any extension or delays to the trial, and the impact on resources."

1030. JUSTICE Scotland noted in its written submission that—

> "The Bill lacks details as to who will provide representation, how it will be resourced, what training is required and how it will be funded…ILR is only a valuable right if it is easily accessible."

1031. The Lord Advocate raised a practical point relating to the accreditation of individuals providing independent legal representation—

> "The profession at large would take on the ILR role and I would be concerned to ensure that there was a proper process of accreditation for solicitors who become involved in such work…."

Conclusions and recommendations

1032. The proposals in the Bill to provide publicly funded independent legal representation to complainers when applications are made under section 275 of the Criminal Procedure (Scotland) Act have been generally welcomed. This section regulates the use of evidence relating to the sexual history or character of complainers in sexual offence trials.

1033. Lady Dorrian expressed her view that the case for such representation was unanswerable. The proposals were also supported by a wide range of

organisations including Rape Crisis Scotland, representatives of the legal profession, the Senators of the College of Justice and the Lord Advocate.

1034. The proposals have our support too. The current position cannot continue, whereby complainers may be required to express a view, at short notice, on complex legal provisions relating to the use of evidence about their sexual history, without any legal advice and representation. This can cause complainers considerable distress and it is not in line with trauma-informed practice.

1035. Although the provisions relating to independent legal representation were generally supported, we heard some views about the practical details of how they would operate.

1036. One of the areas the Committee would have wished to scrutinise is the process and the application of section 274 and 275 otherwise known as the 'rape shield provisions'. It would be helpful if the Scottish Government provided further information about this.

1037. Specifically, we heard several comments that the proposed arrangements for disclosing relevant information in relation to a case could be simplified. For example, the Senators of the College of Justice suggested that the procedures in the Bill would prove "time-consuming and cumbersome", due to the requirement for the Crown to ask the court's permission to disclose evidence to the complainer's representative. Lady Dorrian expressed a similar view. We heard other comments that it was not clear what would happen, under the new arrangements, if a section 275 application was made during a trial and not as part of the pre-trial process where this is usually made. There were concerns expressed that these types of request might delay the trial, and potentially the complainer's evidence, for days.

1038. In our view, it is important that the new arrangements for independent legal representation are workable and efficient, and do not contribute to delays in the courts. It is also important that a complainer and any lawyer they have to appoint are able to have a reasonable amount of time to consider any request under section 275. As explained in paragraph 994, the Bill currently suggests 21 days but we heard evidence that this should be extended to 28 days.

1039. We therefore recommend that the Scottish Government addresses the points which have been raised with us about the proposals in the Bill and bring forward Stage 2 amendments where necessary to simplify the procedures.

1040. We also heard views that the provisions in the Bill should be extended to provide independent legal representation or advice at other stages in the justice process. This was a particular theme of the evidence we received from survivors. They felt they needed someone advocating on their behalf, particularly early in the process. In their view, this would have significantly improved their overall experience of the justice process. We are sympathetic to this view and invite the Scottish Government to comment on the evidence we heard. However, given the limitations on available resources, we think the

immediate focus should be on properly resourcing the new provisions for independent legal representation for section 275 applications.

PART 6: PILOT OF RAPE TRIALS CONDUCTED BY A SINGLE JUDGE WITHOUT A JURY

Proposals in the Bill

1041. Section 65 of the Bill would allow the Scottish Government to establish, by secondary legislation, a pilot scheme for criminal trials of rape or attempted rape by a single judge without a jury.

1042. The Bill provides that the pilot would—

- Take place within the High Court and/or the proposed Sexual Offences Court (as provided for in Part 5 of the Bill)
- Involve a single judge delivering the verdict following a trial and providing written reasons for that verdict
- Be followed by a review and publication of a report on how it operated.

1043. The Bill provides that further details of the pilot would be set out in secondary legislation, which would be preceded by consultation with various people/organisations. These are—

- The Lord Justice General
- The Lord Advocate
- The Faculty of Advocates
- The Law Society of Scotland
- The Scottish Courts and Tribunals Service
- Such persons providing victim support services as Ministers consider appropriate, and
- Any other person Ministers consider appropriate

1044. The secondary legislation would be subject to affirmative procedure in the Scottish Parliament and would—

- Set out the length of the pilot
- Provide more detailed criteria for the types of cases which the pilot would deal with (e.g. whether the pilot should be restricted to single complainer cases)
- Include provision allowing the defence to make representations on whether those criteria are met in a particular case.

Scottish Government's position

1045. These provisions in the Bill attracted considerable interest.

1046. It is therefore worthwhile setting out the Scottish Government's stated reasons for bringing them forward. These are set out in the Policy Memorandum. We highlight some of the key points below.

Scottish Government's concerns

1047. The Policy Memorandum notes that in Scotland juries return verdicts of acquittal at a significantly higher rate for sexual offences cases than for other crimes. It states that—

> "…the significant and enduring nature of the disparity indicates that there are systemic problems with the treatment of these cases within the criminal justice system in Scotland."

1048. The Policy Memorandum makes the comment—

> "It is clear that urgent attention is needed and that fundamental aspects of the system on which the prosecution of serious sexual offences is based require close examination."

1049. It went on to state that "it is not compatible with a trauma informed approach to require complainers to participate in a system which they perceive is stacked against them".

1050. The Policy Memorandum notes that "a compelling body of evidence" suggests that the existence of rape myths has an influence on decision-making by juries in sexual offences cases. It argues that numerous studies have indicated that jurors not only subscribe to rape myths and preconceptions but that they carry those with them in their deliberations, impacting the verdicts they reach in these cases.

1051. Some examples of rape myths are that lack of physical resistance may indicate consent that a lack of calling for assistance may indicate consent and that a delay in reporting is indicative of a false allegation.

1052. The Policy Memorandum also highlights that the suggestion has been made that jurors are risk averse in their approach to exercising their functions, particularly when it comes to convicting those accused of rape.

1053. The Policy Memorandum refers to the quotation from an unnamed judge, contained in the report of Lady Dorrian's review group, which states: "I see a number of acquittals each year in rape cases which, to my mind, are not explicable by rational application of the law to the evidence".

1054. The Policy Memorandum also notes that the Scottish jury research also highlighted a lack of understanding amongst mock jurors about key legal concepts, such as the rule requiring corroboration.

1055. For these reasons, the Policy Memorandum concludes that—

> "The Scottish Government considers that in order to ensure a fair justice system, accessible to all, it is necessary to consider the most effective way to address this critical issue within the context of Scotland's justice system."

Reasons for proposing a pilot

1056. The Policy Memorandum notes that Lady Dorrian's review identified that moving from a system in which determinations of guilt are made by juries, to one in which these were made by a single judge, could mitigate the impact of rape myths and pre-conceptions on verdicts in these cases.

1057. Lady Dorrian's review recommended that—

> "Consideration should be given to developing a time-limited pilot of single judge rape trials to ascertain their effectiveness and how they are perceived by complainers, accused and lawyers, and to enable the issues to be assessed in a practical rather than a theoretical way."

1058. However, the review group was, in their words, "strongly divided" on this issue.

1059. The Policy Memorandum notes that—

> "The Scottish Government is convinced by the arguments that a pilot will provide an important opportunity to critically assess matters and gather evidence to inform the debate."

1060. The Bill therefore contains powers for Scottish Ministers to enable a time-limited pilot of single judge rape and attempted rape trials without a jury.

1061. According to the Policy Memorandum—

> "The policy objective is to gather evidence to enable an analysis, properly informed by empirical research, to be undertaken of some of the difficulties encountered in Scotland in the prosecution of cases involving rape, and in particular to allow an assessment of the system by which verdicts are reached."

1062. As we will go on to discuss, there has been some debate about the conclusions reached by the Scottish Government regarding the conviction rates for rape in Scotland and about the prevalence of rape myths among jurors.

Conviction rates

1063. It is clear from the Policy Memorandum that one of the considerations behind the proposal for a pilot of judge-only trials is concern about conviction rates for sexual offences.

1064. We asked the Cabinet Secretary whether the purpose of the pilot was to increase conviction rates. She commented that—

> "It would be wrong of me to portray those as a tool—a lever or a button—that can increase conviction rates… I cannot be unconcerned about those rates. I must respect the independence of the courts and judiciary—indeed, I am under a legal obligation to do so—but I want to find the right way to tackle the issue and I want

to look at the evidence without prejudging, because we cannot ignore those conviction rates."

1065. She went on to say—

"The concern is not only mine: it is a concern for a number of well-respected legal people and for victims and witnesses groups. Much of the bill, including the pilot, comes from that place of concern about the consistently lower conviction rates for offences such as rape and attempted rape."

1066. We have been keen to obtain accurate information about conviction rates in sexual offences cases to understand the extent of the problem which has been identified. It is also important to obtain accurate data to provide a baseline on which the results of any pilot are to be assessed.

Availability of data

1067. The Policy Memorandum states that 51□ of people proceeded against in court for rape and attempted rape in 2020/21 were convicted compared to an average of 91□ across all offences. For each of the last ten years for which comparable data is available, the average rate of conviction over this period for rape and attempted rape was 46□ compared to 88□ for all offences.

1068. One important additional piece of data which emerged in our evidence-taking related to the conviction rate for single-complainer rape cases.

1069. The Lord Advocate told us—

"The current overall conviction rates that are reported disguise the fact that, in acquaintance-type rapes, conviction rates are at about 20 to 25 per cent. That is why the selection of cases was identified."

1070. The Lord Advocate defined "acquaintance-type" case as those cases in which there is one complainer and one accused.

1071. This information had not, to our knowledge, been publicly available before.

1072. It is important to have this particular information because one of the proposals in Lady Dorrian's report was that the pilot should encompass all single complainer rape and attempted rape cases in which there are either no other charges on the indictment or in which those other charges are only minor or evidential. Sandy Brindley commented—

"That is such important data, particularly when we are looking at the rationale for the judge-led pilot involving single-complainer cases."

1073. Nevertheless, concerns remain about the quality of the data available on sexual offences in the justice system. Sandy Brindley noted that there is no system which tracks cases through the justice system. She commented that—

"We have data on the number of reports to the police and on the number of prosecutions and convictions, but those two datasets cannot be compared,

because one measures by offence and the other measures by persons accused, and they do not concern the same cases."

1074. Laura Buchan from the Crown Office and Procurator Fiscal Service acknowledged the challenges that exist. She noted that—

> "We all use case management systems, and those that Police Scotland, the Scottish Courts and Tribunals Service and the COPFS use are different. They are primarily used for our operations in marking and prosecuting. Pulling data like that from the systems is not straightforward."

1075. Professor Cheryl Thomas of UCL also highlighted the challenges with the useability of statistics relating to the prosecution of rape cases in the justice system in Scotland. She noted that conviction rates are calculated in Scotland by using the number of individuals who are proceeded against each year in relation to a rape offence and the number of individuals who are convicted. However, these will not necessarily be the same individuals since a prosecution and a conviction can happen in different years.

Comparisons with England and Wales

1076. Another area of discussion has been how conviction rates for sexual offences compare between Scotland and England and Wales.

1077. On the face of it, the conviction rate for these types of offences appears to be higher in England and Wales than it is in Scotland.

1078. The written submission from Professor Cheryl Thomas states—

> "In England and Wales the jury conviction rate for 10 different types of rape charges is known, and the conviction rates range from 63□-91□ depending on the age and sex of the complainant and whether charged under the 2003 or 1956 Sexual Offences Act."

1079. Professor Thomas's submission also states that "our analysis of all those verdicts is that juries in England and Wales are more likely to convict than they are to acquit in rape cases".

1080. However, as some witnesses pointed out, it is not necessarily straightforward to compare the conviction rate statistics from England and Wales with those from Scotland. Professor James Chalmers of the University of Glasgow commented that "there is an issue with the comparability of conviction rate data between Scotland and England". This might point to challenges in drawing too many lessons for Scotland from the conviction rates in England and Wales.

1081. Laura Buchan from the Crown Office and Procurator Fiscal Service commented that "we have a unique legal system and our own criminal justice system, so it is very difficult to compare it with those of other jurisdictions".

1082. We heard that one of the reasons for differing rates of conviction in the two jurisdictions might be the different criteria used by prosecutors in deciding whether to take forward a case. As Stuart Munro of the Law Society of Scotland commented,

"put simply, if we prosecute the cases where we are more certain of getting a conviction, we will probably have higher conviction rates than if we do not".

1083. Stuart Munro went on to suggest that—

> "…in Scotland, perhaps because of the requirement for corroboration, there is more of a sense that any case that meets the corroboration threshold should be prosecuted, whereas in England there might be more of an assessment of, if you will forgive the expression, the quality of the evidence, essentially—a weighing up of the likelihood of conviction."

1084. In Scotland, the test set in Prosecution Code is that—

> "The Procurator Fiscal must be satisfied that there is sufficient admissible evidence to justify commencing proceedings."

1085. In England and Wales, the test in the Code for Crown Prosecutors is that—

> "Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge."

1086. Laura Buchan of the Crown Office and Procurator Fiscal Service argued that there are "robust checks and tests for all cases" to ensure there a sufficiency of evidence before proceedings are commenced. In the case of sexual offences and rape, there are a range of tests which take place.

1087. The Cabinet Secretary said—

> "The number and quality of cases that actually get to court have a huge bearing on conviction rates. In England and Wales, we have seen a drop of nearly 60 per cent in charges and prosecutions. Committee members might have seen, in the debate south of the border—I am narrating, not passing comment—that some senior police chiefs have been saying that cherry-picking goes on among prosecutors."

Challenges in securing convictions in rape cases

1088. Another argument we heard is that conviction rates for rape are lower than for other crimes because convictions are inherently more challenging to obtain due to the particular nature of the crime, especially in single complainer rape cases. Simon Brown of the Scottish Solicitors Bar Association commented—

> "There has to be recognition of the peculiar difficulties of rape cases. Rape is a very difficult charge to prove. There is very rarely any independent evidence, and cases are almost entirely dependent on hearing evidence from a complainant and evidence from an accused. The independent evidence tends to be neutral."

1089. The written submission from the Law Society of Scotland made a similar point, noting that there are often no eye-witnesses and juries can be presented with competing accounts both of which appear plausible. Furthermore, complainers can, on occasion, misremember events, or incorrectly identify perpetrators.

1090. In his written submission, Tony Lenehan QC noted that—

> "Our shared experience is that where the evidence suggests a conviction, juries ordinarily convict. Where it doesn't, they don't."

1091. However, a counter argument to this point is that the low conviction rate cannot simply be explained by these challenges and there may be other factors at play, including the existence of rape myths.

Existence of rape myths

1092. As we have noted, the Policy Memorandum states that, in the view of the Scottish Government, "a compelling body of evidence" suggests the existence of rape myths.

1093. This has been one of the reasons cited in support of undertaking a pilot of judge-only trials. The suggestion is that low conviction rates have been caused by juries holding rape myths.

1094. However, there has been some debate about the extent to which juries do, in fact, hold rape myths.

1095. Various pieces of research have been cited by different organisations as supporting different sides of the debate on the extent to which rape myths exist.

1096. The Policy Memorandum noted, for example, that "the previously discussed jury research that took place in Scotland found clear evidence of rape myth adherence among those eligible for jury service".

1097. On the other hand, the Faculty of Advocates has cited the research undertaken by Professor Cheryl Thomas of UCL. The Faculty stated in its written submission—

> "Her findings suggest that rape myths were themselves "myths.""

1098. We took evidence, on the same panel, from two of the authors of the Scottish jury research (Professor James Chalmers and Professor Vanessa Munro) and, separately, from Professor Cheryl Thomas about their research. As we will go on to discuss, their positions are perhaps more nuanced than has been suggested by the debate so far.

1099. Professor Cheryl Thomas told us about her research in which jurors were spoken with following a verdict and asked about their views on rape and sexual offences. She commented that—

> "…we found that, contrary to popular belief, individuals on jury service in England and Wales did not overwhelmingly believe rape myths and stereotypes. However, there were a few issues on which they could have done with some additional information to ensure that they were not confused. When you marry up those two pieces of research, you will see that there is no evidence in England and Wales to suggest that juries are biased against complainants in sexual offences cases on a systematic basis."

1100. By contrast, Professor Vanessa Munro of Warwick University noted that prominent themes consistently marked the juror discussions in the Scottish jury research. For example, jurors often expressed expectations regarding signs of resistance or physical injury in order to consider a complainer credible. She commented—

> "Taking all that evidence together, our view is that there is certainly a credible basis for concern with regard to the role that misconceptions and misunderstandings of rape, rapists and rape complainers might play in the deliberation process."

1101. However, we also heard from all those on the panel that it was advisable to be cautious when drawing conclusions from research into jury behaviour.

1102. Professor Vanessa Munro felt that it was important to look holistically at the body of evidence and commented "we should rightly exercise considerable caution before we make any fundamental decisions based on one piece of evidence". She told us—

> "We might need to be a little bit careful not to get into the territory of assuming that there is a body of evidence that says certain things based on mock juries and a body of evidence that says certain things based on real juries. Actually, even there, the findings are more complex."

1103. Professor Cheryl Thomas expressed a similar view. She explained—

> "If you use a range of methods and both or several of them come up with the same answer, you can feel more secure that the research findings are reliable. If you have contradictory findings, something else is going on. Therefore, I personally would feel uncomfortable with relying on a single study to come to large conclusions about major changes in the jury system."

1104. Professor James Chalmers did not see the different pieces of research as being "in opposition" to each other. He did not consider that the Committee should think it has to "adjudicate" between them. Instead, "the appropriate course is to read the available evidence together and decide what conclusions can be drawn from that".

1105. We note, for example, that Professor Thomas told us—

> "I am not sitting here saying that I do not believe that there is no juror who believes a rape myth. I find it quite worrying that, for some reason, my research has to be knocked down in Scotland."

1106. She noted that a small number of jurors held some views that would be considered to be rape myths and stereotypes, but that was a very small proportion across the range of issues.

1107. Both sets of researchers emphasised that one of the challenges is to understand how views expressed by jurors actually affect decision-making in the jury room.

1108. Professor Cheryl Thomas noted in her written submission that "jurors may express views in the deliberating room, but these do not necessarily determine either the juror's individual decision in the case or the jury's verdict".

1109. Professor James Chalmers made a similar point, stating—

> "In the Scottish jury research, as Professor Munro said, we saw, to a significant extent, jurors expressing and explicitly relying on rape myths in deliberations. However, given the nature of that research, we cannot quantify exactly what difference that made to outcomes. It is not easy, or even perhaps possible, to do that in the context of group deliberations."

1110. In other words, it is very difficult to know how an individual juror's expression of rape myths influenced other jurors, or even made a difference to their own decision as to what a verdict should be.

1111. Professor James Chalmers also made the point that the unique nature of the Scottish justice system made it hard to translate research conducted in other jurisdictions into a Scottish context.

1112. In her written submission, Professor Cheryl Thomas noted "fundamental differences in approach to trial by jury" between England and Wales, and Scotland. She highlighted, in particular: the lack of a requirement for corroboration in England and Wales□differences in jury sizes□differences in the options for the verdict□and the greater historical reliance of written jury directions in England and Wales.

1113. She noted that these differences in the system of trial by jury could contribute to the apparent differences in jury rape verdicts and juror attitudes seen between the two jurisdictions.

1114. Another point made by Professor James Chalmers was that research involving 'real jurors' is faced with some of the same limitations as other research, namely that the jurors are not deciding on real cases and do not hold people's fates in their hands. Instead, the position is that the real jurors are asked to serve on mock juries or to answer questions after their experience at court.

1115. Overall, Professor James Chalmers commented in relation to the available research saying—

> "There is a limit to what is available, so I think that there is a decision for the committee and Parliament to make on whether the evidence base that is available is sufficient to justify reform. I recognise the difficulty, but I cannot offer an easy way out of it."

1116. We asked the Cabinet Secretary for Justice and Home Affairs for her views on research around rape myths. She commented that—

> "We have overwhelming evidence that rape myths are a factor and that they influence decision-making. I know that there is not unanimous agreement and I would never expect to find that among academics, just as I would never expect unanimous agreement within the legal profession or among politicians. Legislators are meant to take everything in the round. I am not going to cherry pick or play one piece of evidence off against another."

Views on the proposals

1117. Turning now, to views on the proposal in the Bill that there should be a pilot scheme for criminal trials of rape or attempted rape by a single judge without a jury.

1118. We heard several different views on this particular proposal in the Bill. It was notable that there was a lack of agreement between some key figures in the justice sector as to whether the pilot should take place.

1119. As we have discussed, the report on Lady Dorrian's review recommended that a pilot be conducted. However, it also noted that the review group was strongly divided on this issue. The report itself stated—

> "….this was not an issue on which the Review Group was able to reach unanimity, views being fairly evenly split between retaining and dispensing with a jury."

1120. We asked Lady Dorrian about the nature of the division in the review group and she told us—

> "All that I can say is that they were divided. There was no majority, otherwise a majority view would have been put across. They were divided in general terms, and that is all I can say."

1121. We also note, from the written submission from the Senators of the College of Justice that the senior judiciary has a divergence of views as well. Indeed, the submission included separate statements from judges who were supportive of the proposal and those who were not.

1122. We asked Lord Matthews about the relative support for each position among Senators. He commented that—

> "All I can say is that I think that there were significant numbers on each side of the argument, if that helps. We did not take a note of the numbers."

1123. We will now discuss some of the views we heard, grouped under some of the broad themes which emerged.

Opportunity to gather evidence

1124. Many of those who supported the idea of a pilot argued that it would be a useful mechanism for gathering evidence about whether judge-only trials would have a benefit versus jury trials.

1125. Lady Dorrian commented that "the real benefit would be that we would then have evidence of what happens in a judge-only trial, and we would be able to compare that with what happens in jury trials". She noted that "at the moment, it is all speculation, because we have nothing to compare it with".

1126. The Lord Advocate indicated that she supported the pilot. She commented that she hoped it would "allow an evidence base for further consideration of what problem with the current system results in such a divergence between levels of conviction in other types of crime and those in sexual crime".

1127. Simon Di Rollo □C indicated that he was not speaking for the Faculty of Advocates, but felt that—

> "We should have a genuine pilot of a non-jury way of trying certain cases for a period of time. That is worth looking at. At the same time, you have to recognise that that will require the profession—not just the practitioners but the judges themselves—to adapt to that situation"

1128. The written submission from the Scottish Women's Convention also supported the pilot and felt that this could create an improved experience for victims and facilitate change, while also allowing for an assessment of potential risks and disadvantages.

1129. The written submission from Victim Support Scotland "strongly supported" the proposal for a pilot, arguing that it has the potential to transform the experiences of survivors in the criminal justice system. The written submission stated that it—

> "…would strongly urge the Scottish Government to stand by this commitment and listen to the voices of campaigners and survivors in Scotland calling for change."

1130. Dr Marsha Scott from Scottish Women's Aid noted that the vast majority of domestic abuse cases were currently heard in sheriff courts without a jury. However, she commented that—

> "I understand why people are nervous about a judge-only court, so it is appropriate to start it as a pilot. Everything that we know about improving systems tells us that you start small when the risk is high. I have to keep coming back to the point that what we have is not working, and we have to be willing to take the risk."

1131. Dr Marsha Scott indicated that she had sat on Lady Dorrian's review group and had been particularly struck by the accounts of senior judges who had expressed dismay when juries had come to conclusions that, from their perspective, were not aligned with the evidence.

1132. Professor Vanessa Munro of the University of Warwick commented that "a judge-only pilot would not be an unreasonable move for gathering more evidence" but cautioned that a judge-only trial may not necessarily be the solution to some of the issues which had been identified.

1133. The Cabinet Secretary summarised her perspective as follows—

> "The essence of the time-limited pilot is to examine matters in greater depth□to ascertain its effectiveness and how it is perceived by everybody involved□to enable the issues to be assessed in a practical rather than theoretical way□and to have informed debate. In that regard, it is an unrivalled opportunity to look at what, if anything, is next, bearing in mind the long-standing concerns in and

around the prevalence of rape myths—in our society and in juries—and about conviction rates."

1134. We have also noted earlier in this report that several key figures in the justice sector, have called for significant changes to the justice system with the objective of affecting substantial change to the experience of victims and witnesses, rather than piecemeal improvements. The proposed pilot would seem to fall into the former category. The Cabinet Secretary alluded to this point when she stated—

"We have an opportunity here and now to make seismic change through the bill as a whole. The pilot is one part of that, but the inclusion of the pilot in the bill says that we are not about to walk away from difficult issues."

Involvement of real cases in the pilot

1135. We also heard several other views, particularly from representatives of the legal profession, who had significant concerns about the proposal for a pilot.

1136. One major area of concern was that the pilot would involve real cases and therefore if it was ultimately found not to be a success, this would have real-life consequences, particularly for the accused.

1137. Sheila Webster of the Law Society of Scotland made the point—

"…that it is not truly a pilot. We are talking about live cases here. People's lives will be permanently affected, and at the end of the pilot we might decide that it was not a very good idea. We are using the word "pilot", but we are dealing with real-life cases, and, as we understand it, it will not be optional."

1138. Tony Lenehan □C from the Faculty of Advocates expressed similar concerns. He commented that—

"□ou are then forcing people into an experiment that could change the course of their lives, and there is nothing experimental about 10 years in jail or a life on the sex offenders register. If, in due course, it is decided that the proposal is not a great way forward, that will not be much comfort to those people."

1139. Tony Lenehan □C and Sheila Webster were particularly concerned by the proposal that participation in the pilot would be compulsory with no opt-out.

1140. On this point, the Cabinet Secretary noted that the Scottish Government's view is that no accused and no victim should be able to decide which court they appear in or which procedure they appear under. She noted, however, that when setting the criteria for the type of offence to be tried under the pilot (for example, single complainer cases), there would be scope for an accused to dispute whether their offence fell into that category.

Diversity and representation

1141. One of the debates around the merits of a trial with a single judge versus a jury, is around the diversity of the decision-makers and the degree to which they are representative of the population. A related debate has been whether a single judge

or a jury is better equipped to take account of the existence of rape myths when taking decisions.

1142. Simon Brown of the Scottish Solicitors Bar Association commented that—

> "Our view is that the best defence against rape myths is to have 15 different and diverse people pooling their points of view. That will result in the dilution of any particularly strong erroneous belief that is held by any one particular member of the jury. As I said earlier, there are studies that show that single judges are not immune to unconscious bias, for whatever reason."

1143. Sheila Webster of the Law Society of Scotland noted that "a single judge, or even two or three judges, will not give the diversity that exists on most juries." Tony Lenehan KC from the Faculty of Advocates noted that "when complainers, by and large, are 19, 20 or 26, you are not going to get any judge sitting who has shared their life experience".

1144. Some witnesses mentioned that the proposals in the Bill meant that a person would no longer be tried by 'a jury of their peers'.

1145. Sheila Webster commented—

> "We talk about "a jury of their peers". Are people looking out and seeing their peers? If they are not, is that what is putting off some of the victims that you heard from last week?"

1146. The written submission from the Law Society of Scotland noted that the judiciary in Scotland is less diverse than the wider population. It noted that in 2021, of 232 judicial office-holders, 109 were aged over 60 and 89 aged between 50 and 59□68 were female (29□) and 164 male (71□).

1147. Another point made by Tony Lenehan □C of the Faculty of Advocates was that judges were not immune to their own biases—

> "The fact that someone sits on the bench and takes the oath does is not a guarantee of an absence of hidden bias, or an absence of character defect□there recent examples of people who have clearly smuggled character defects through the Judicial Appointments Board for Scotland to end up on the bench."

1148. Simon Brown of the Scottish Solicitors Bar Association commented that "there is no proof that individual judges are any less susceptible to rape myths than jurors are" and that, although judges are trained, it does not mean they do not make mistakes.

1149. Professor James Chalmers of the University of Glasgow commented "on the fundamental point underlining the question, which is whether judges are in some way immune from bias, they absolutely are not—I do not think that anyone is".

1150. Simon Brown from the Scottish Solicitors Bar Association acknowledged the existence of rape myths, saying "there is a clear body of evidence that such assumptions or preconceptions exist, to an extent". However, he argued—

> "…the only way to change the impact of rape myths is to change the views of the public, through education. You cannot educate a citizenry by removing it from the process."

1151. Similarly, the written submission from the Law Society of Scotland highlighted the role of education of the public as the most appropriate way of addressing concerns about rape myths—

> "We submit that this issue is about education rather than reform of the criminal justice system. If it is correct that the belief in such myths is informing jury verdicts then we propose that a proportionate response to this issue is to educate the public about the existence of such myths and why they should be disbelieved."

1152. Although Sandy Brindley of Rape Crisis Scotland agreed that rape myths can be addressed through education, "it is much easier to do that sort of work with a small group of judges than it is with the entire Scottish population, which is what we would be talking about with juries". She added—

> "There are valid questions to ask about the diversity of the judiciary and attitudes, but they can be addressed through training in a way that would be much more difficult with juries."

Views of survivors

1153. We were interested to hear the perspective of survivors of sexual crime with experience of the criminal justice system.

1154. While the views we heard were personal ones and not necessarily representative, it was notable that they had some reservations about both the current jury system and the proposal for judge-only trials.

1155. Witness 1 explained that she had experience of a civil case and was content for the sheriff to make the decision. She commented that "she wanted someone who had an understanding of the law and background knowledge" rather than jurors who might not be as focused.

1156. By contrast, Jennifer McCann commented that she would be "concerned about potential bias in a single judge-only trial" and that she was "on the fence" about the idea. She noted—

> "The benefit of having a jury is that there are different points of view and opinions, and ideas can be expressed, explored and discussed to their full extent."

1157. However, she argued that there should be trauma-informed specialist juries. She noted the anxiety she had felt about how she was expected to behave in the courtroom and felt that a specialist jury could be made aware of these considerations.

1158. At present she noted that "it is about taking 12 to 15 random members of the public, sitting them in a gallery and telling them to decide what to do with someone's life". She commented—

> "Are they really equipped to decide if someone has been raped or not, based on how they act in a courtroom over a couple of hours? That is a point to argue."

1159. Hannah Stakes indicated that she was concerned about the potential bias of a single judge. She felt that there should be a professional element to the decision-taking. She commented—

> "I have always advocated for it being professionals, whether that would be a panel of judges or trained individuals—even if they were legal students, they would come into the room with a level of legal training—because you would be given a reasoned decision that made sense afterwards."

1160. She was not necessarily in favour of juries. She noted—

> "I do not trust juries either. One juror was asleep, and the jury took less time to come back with a verdict than I did to get ready this morning. There is something to be worked out in the middle."

1161. Anisha □aseen did not support the proposal for a single-only judge trials and had concerns about the potential bias of a judge, who she noted would usually be a white man. She commented that —

> "Nobody is exempt from unconscious bias, and that is unfair or unrealistic. In an ideal world, a judge would not have any bias□they would put everything to the side and be professional. However, that is the point about unconscious bias. If we had to go down a judge route, there would need to be a panel."

1162. Sarah Ashby expressed the view that—

> "Having a single judge is not, in my opinion, the way to go… If I were to go through the process again, I would feel more comforted by having a jury than by a single person making the decision about my life."

1163. However, Sarah Ashby did acknowledge that her view was a personal one, and that some survivors might welcome a written set of reasons for a verdict so they could understand how it was reached.

Right to a fair trial

1164. We heard some views which expressed concern that the proposals for a pilot of judge-only trials would breach the rights of the accused to a fair trial, as set out in Article 6 of the European Convention on Human Rights (ECHR).

1165. The Policy Memorandum states, however, that Article 6 of the ECHR, does not provide a right to trial by jury. This is reflected in the fact that the vast majority of criminal trials in Scotland are heard by a sheriff or justice of the peace, sitting without a jury. It is noted that these are cases prosecuted at less serious summary level for which the maximum sentence is 12 months imprisonment. The Policy Memorandum notes that—

> "The Scottish Government therefore considers that provisions giving Scottish Ministers the power to conduct a pilot of single judge rape trials are compatible with article 6 of the ECHR."

1166. In the written submission from the Senators of the College of Justice, some of the Senators, who supported the pilot noted that—

> "It is not necessary under article 6 of the Convention for there to be a jury in order for a court to be independent and impartial or for a trial to be fair. The majority of criminal prosecutions in Scotland are tried by an independent and impartial tribunal in the form of a sheriff sitting alone."

1167. Another point about the proposal's compliance with Article 6 was made in the section of the submission written by the Senators who did support the pilot, which stated—

> "Whilst as Senators we would not express a concluded view on the validity or otherwise of these points, we are aware of arguments to the following effect. The pilot scheme amounts to a court set up by the government with a limited life span, and subject to examination and review by the government. That may not be an independent tribunal. It may not comply with the requirements of ECHR article 6. It may not be within the legislative competence of the Scottish Parliament under section 29(2) of The Scotland Act 1998. Further, the combination of such a court with judges who have no security of tenure in that court may not satisfy the requirements of a fair trial."

1168. The written submission from Professor James Chalmers of the University of Glasgow, Professor Vanessa Munro of the University of Warwick and their academic colleagues, stated that there are many jurisdictions around the world, including those bound by the European Convention on Human Rights, that do not have lay participation in criminal cases at all. Furthermore, the submission notes that the European Court of Human Rights has expressly ruled that the right to a fair trial does not require that the determination of guilt is made by a jury.

1169. In her evidence to the Committee, the Lord Advocate addressed this point. She told us that "the head of the prosecution service and those within the service who support me say that the provisions of the bill are within the legislative competence of the Parliament and there is no breach of article 6 in relation to the suggestion that a trial could be held without a jury".

1170. For her part, the Cabinet Secretary commented—

> "I am confident that a pilot will be lawful, and I am confident that, as a Government, we will comply with the European convention on human rights. People have a right to a fair trial, but they do not have a right to a jury trial. I know that people have different views on that. Bear it in mind that single-judge trials are not unique to our current system."

Judicial scrutiny and independence

1171. We heard some concerns that the pilot may lead to a situation where judges are under greater scrutiny in respect of the decisions they are taking.

1172. The Sheriffs and Summary Sheriffs' Association expressed concern that judges may feel the weight of public scrutiny under the proposed pilot. Its written submission noted "as has been evident since the publication of the Bill, the form and content of the debate is noisy and frequently personalised". The submission commented that—

> "There is a very real risk that judges will in effect be on trial: if the political yardstick for success is an increased conviction rate, it is inevitable that individual judicial decisions will be the subject of significantly greater public comment."

1173. We also heard some concerns expressed that the proposal for an evaluation of the pilot will mean that the Scottish Government will, in effect, be assessing the performance of the judiciary.

1174. A written submission from Sheriff Douglas Cusine, Sheriff TA□ Drummond, Alistair Bonnington, and Douglas Mill posed the question—

> "…is this review going to look also at the 'track record' of those judges who participate? … The whole concept offends against the independence of the judiciary that Government takes upon itself power to review judicial disposals, whether or not that review is of a class of cases as opposed to particular decisions."

1175. Simon Brown of the Scottish Solicitors Bar Association raised the question as to whether judges' decision-making might be impacted by the fact of their participation in a pilot scheme. He commented—

> "If there is an unconscious bias and the message is, "You have been selected to take part in a pilot, the purpose of which is to see why conviction rates are too low," it will be hard to argue that there will not be an unconscious bias towards conviction."

1176. The written submission from the Faculty of Advocates argued that "a scheme whose raison d'□tre is to increase conviction rates is fundamentally at odds with our system of justice".

1177. Lord Matthews felt it should be made clear that the decision in any particular case is not something which should be evaluated—

> "We do not want individual judges to think that there is some sort of league table, and we do not want the public to think that there is a league table of judges who acquit or do not acquit or whatever."

1178. Lady Dorrian did not think that judges would be influenced by the fact that they were participating in a pilot, commenting—

> "I do not think that there is any risk of that. The pilot cases would be presided over by experienced professional judges, who would only decide the case according to the evidence. We are used to having pilots of one kind or another, such as drug courts, and they do not seem to have caused problems in the past."

Written reason for verdicts

1179. We heard from some witnesses that they would welcome the requirement in the Bill that judges conducting trials in the pilot must give written reasons for their verdicts.

1180. The Policy Memorandum explained that this requirement was in line with European Convention on Human Rights requirements and that it—

> "…delivers one of the key suggested benefits of single judge trials: clarity and transparency in decision making. This is in stark contrast to verdicts delivered by juries which are accompanied by no explanation."

1181. According to the Policy Memorandum, the requirement for written reasons will provide a new opportunity for the accused to challenge those reasons as a ground for appeal against conviction.

1182. Simon Di Rollo KC described the proposal for written reasons as "the great prize" and felt it would benefit both the complainer and the accused.

1183. Professor James Chalmers of the University of Glasgow considered the new requirement would be a safeguard to the use of judges since there will be an opportunity to scrutinise written reasons. He noted that there is a discipline involved in the process of producing a written judgment that can force the writer to check their own biases and ensure that what they conclude is actually supported by the evidence.

1184. Professor Cheryl Thomas of UCL cautioned, however, that a written judgment might not necessarily reveal everything which went into a judge's decision-making process. She also commented that judgments can often become very pro forma, with judges setting out their decisions in written judgments in standard ways.

1185. Lord Matthews offered reassurance that the requirement to provide written reasons would not be unduly onerous on the judiciary. He commented that this was something which judges were used to doing, for example in civil cases.

1186. The Cabinet Secretary expressed her view that "there is huge value in having written reasons" and that it would benefit both complainers and the accused. In relation to the pilot, she commented that they "will give us an unrivalled opportunity to gather better evidence about what the real issues, deliberations and challenges are".

Tone of court proceedings

1187. There was some discussion about whether a different tone might be adopted by lawyers participating in a trial in which there was a judge rather than a jury.

1188. In particular, we explored with witnesses whether this might address some of the concerns we had heard about inappropriate cross-examinations by defence lawyers. We have previously discussed these in the section of the report on Part 2 of the Bill on trauma-informed practice.

1189. Professor Vanessa Munro of the University of Warwick noted that further research is required but "there is a suggestion that, were the jury not the target decision makers for some of the factual matters in a case, that would impact on how counsel perform in the courtroom, and that that, in turn, might shift some of the tone and dynamics of the trial process".

1190. However, Tony Lenehan □C, speaking on behalf of the Faculty of Advocates, did not think his approach to cross-examination would change if he was addressing a judge rather than a jury. He described his approach as being one in which—

> "There is no theatre attached to it. There are no illicit tactics. It is based on the statements that I have, the statements of other witnesses, and things that seem to me to need help from the witness. I do not think that I would change any of that."

1191. Simon Di Rollo □C offered a slightly different perspective. He commented that—

> "Lawyers approach a jury case in a way that is different from the way in which they would approach a case with a single judge. It is, if you like, the contrast between an impressionistic approach taken with a jury—that is, they try to create an impression—and the more analytical approach that is taken with a judge. There is a difference in that."

1192. For her part, the Cabinet Secretary commented that "I have always been persuaded that a more inquisitorial approach is worthy of consideration, particularly in what are sensitive, complex and sometimes evidentially challenging cases".

Updated jury directions and corroboration requirements

1193. We heard some arguments that it would be preferable to rely on alternative mechanisms to address concerns about juries relying on rape myths, rather resorting to single-judge trials.

1194. The report of Lady Dorrian's review group stated—

> "Whatever view is ultimately reached in this jurisdiction in relation to the use of juries there is no doubt that as long as they are retained in sexual offence cases there is a pressing need for reform in relation both to the information provided to jurors and the means by which it is provided."

1195. Lady Dorrian's review group made various recommendations for improvements including providing more information for juries in relation to common rape myths and stereotypes and issuing written directions to juries in plain English.

1196. On 7 September 2023, the Jury Manual Committee of the Judicial Institute for Scotland updated the guide for jurors to include a new chapter titled 'Addressing Rape Myths and Stereotypes'. It includes directions such as—

> "There is no typical response to rape (or sexual crime). People react in different ways and may do so in a way which you might not expect or as you think you would do. They may tell someone straight away or may not feel able to do so, whether out of shame or fear or other reason."

> "There is no typical response from a complainer who is asked about rape (or sexual crime). People who have been raped may present in many different ways when they are asked about it. They may be visibly emotional or show no obvious emotion."

1197. We heard some views that it would be preferable to wait to see what impact such initiatives had before introducing judge-only trials.

1198. Simon Brown of the Scottish Solicitors Bar Association commented in relation to the new directions stating "I am not aware of whether there has been any study of the impact of the additional guidance, but we definitely think that there should be such a study".

1199. A written submission from Tony Lenehan KC noted that since the Bill was drafted, "the landscape of rape trials has changed significantly with the incorporation of mandatory directions on both rape myths and other potential misconceptions". He noted that the Scottish jury research and Lady Dorrian's report were both prepared before these changes and therefore take no account of them. The submission contended that "the incorporation of these directions cures the ills of the sort the Bill contemplates" and went on to state that—

> "We are aware of no assessment yet of the effect of these changes on jury conviction rates. It is likely too early to do so. It seems absurd that this bold new system of jury instructions is to be abandoned without assessment of its efficacy."

1200. An additional recent development which has taken place since the introduction of the Bill was the judgment in October 2023 from the High Court of Justiciary Appeal Court which clarified the requirements in relation to corroboration.

Panel of judges

1201. One idea mentioned in evidence was whether an alternative to a trial involving a jury or a single judge, would be a panel of judges. This idea was raised by Simon Di Rollo KC who argued that the judges would not all necessary have to be at Senator level. He commented that—

> "There would be a lot of benefit from that. That would water down the potential for bias and the idiosyncratic nature of one person making those decisions."

1202. He went on to state—

> "With a panel of judges, they have the opportunity to discuss the evidence with their colleagues. They can go over what was said and come to a view about whether the person was lying or telling the truth, or whether they were reliable or not reliable."

1203. As we have discussed already, some of the survivors we spoke to also felt that a panel of judges would be preferable to a single judge deciding on a case.

1204. The suggestion of a panel of judges was referred to in the report of Lady Dorrian's review group. It was noted in the report that this might have the advantage of being potentially more representative, possibly more diverse, and bringing greater

confidence in the result, than in the case of a single judge. On the other hand, the report noted that a panel of judges could not be managed within the current complement of judges and sheriffs and the necessary increase in numbers would be difficult to justify and would be very expensive. The idea was not adopted.

1205. When we put this suggestion to the Cabinet Secretary, she referred to engagement she had had with judges from the Netherlands who had spoken about the value of having colleagues involved in the process of deliberation and producing written judgments. She noted—

> "I am in favour of a time-limited single-judge pilot, but if we are talking about the sexual offences court, where there will be judges, temporary judges, sheriffs and principal sheriffs, we might have the option to have a pilot involving more than one decision maker.
>
> I hope that I have not pre-empted any of my thinking on this, because our own conclusions have still to be completed. As with any proposition, there are things that you need to work through properly. I want to make it clear that I am absolutely in favour of a pilot of single-judge trials, but there might be other options that we could explore."

Pilot – details of how it will operate

1206. We heard several views about the arrangements for how the pilot of judge-only trials will operate and the level of detail specified on the Bill versus the details which will be left to regulations.

Provisions in the Bill

1207. There has been considerable debate about how the pilot will operate. It is therefore worthwhile setting out the details which are specified in the Bill itself.

1208. Section 65(1) of the Bill states—

> "The Scottish Ministers may, by regulations, provide that trials on indictment for rape or attempted rape which meet specified criteria are, for a specified period, to be conducted by the court sitting without a jury."

1209. In other words, the length of the trial is to be specified in the regulations.

1210. In addition—

- Subsection (2) requires the regulations to include provision for the accused to be able to make representations as to whether the criteria are met.

- Subsection (3) requires that, before making any regulations under subsection (1), the Scottish Ministers must consult the Lord Justice General, the Lord Advocate, representatives of the legal profession, the Scottish Courts and Tribunals Service, victim support organisations, and any other person Ministers consider appropriate.

- Subsection (4) makes clear that the court has all the powers, authorities and jurisdiction it would have had if it had been sitting with a jury.

- Subsection (5) provides that, where a trial on indictment is held without a jury, the presiding judge must give written reasons for their verdict.

- Subsections (6) and (7) provide the High Court of Justiciary with the necessary powers to make any appropriate court rules to ensure that the criminal procedure for these trials will operate effectively in practice.

1211. Section 66(2) of the Bill states that—

> "The Scottish Ministers must, as soon as reasonably practicable after the end of the period specified in the regulations—
>
> (a) review the operation of trials conducted by virtue of those regulations, and
>
> (b) publish a report on the findings of that review."

In what court will the pilot take place?

1212. Section 65(8) provides that the pilot can take place in either or both the High Court or the new Sexual Offences Court.

1213. Some of the witnesses pointed out that the choice of court might have implications for how the pilot is run.

1214. One point which was made by Alan McCreadie of the Law Society of Scotland was that if the pilot took place in the proposed new Sexual Offences Court, it could be presided over by a sheriff who has applied to become a judge in the new court and has been appointed by the Lord Justice General.

1215. His colleague from the Law Society of Scotland, Sheila Webster, also raised a point about the challenges of assessing the pilot if it is to take place in a new type of court. She commented—

> "How will we design a measure to assess what has made a difference when we are introducing all those changes together and, as I have already said, when many other changes are still bedding in, in our view? How you measure that is a big challenge."

1216. Professor James Chalmers of the University of Glasgow said that he did not think that the pilot could take place for "some years" due the need to implement the other changes in the bill first. He commented that it would be only after those changes had been made that it would be possible to hold a pilot that would enable meaningful comparisons to be drawn between the two types of systems.

1217. Professor Cheryl Thomas of UCL noted that it would be important to have clear baseline information in order to properly compare changes which might have taken place as a result of the pilot. However, she commented that she was "not sure that there is currently a lot of clarity in Scotland about exactly what the conviction rate is arising from jury deliberation on rape charges".

1218. In relation to the length of the pilot, Lady Dorrian commented—

> "I had in mind something like a couple of years, probably, to obtain sufficient material, but that is something that would have to be considered carefully."

1219. The Cabinet Secretary told us that a decision still had to be made if the pilot would take place in the new Sexual Offences Court or the High Court. She commented that there were pros and cons to both options, depending whether the pilot was focused on how the current High Court arrangements operated or whether the comparison would be with the reforms introduced in the Bill.

1220. The Cabinet Secretary noted that the sequencing of the introduction of the different reforms proposed in the Bill would be important. She stressed that no decisions had been made but noted that one approach could be to introduce the jury reforms and the abolition of the not proven verdict first, before phasing in the establishment of the Sexual Offences Court as the court recovery programme to address the backlog created by the COVID-19 pandemic comes to an end. If the pilot is to be run in the Sexual Offences Court, it could be introduced at that point.

1221. She commented—

> "On balance, my preference right now—and I am not closed to other representations—is for the pilot to take place in the context of the sexual offences court, partly because it might give us further options to have a panel of decision makers rather than a single judge."

Criteria for reviewing the pilot

1222. The Bill provides for a review mechanism of the pilot of single judge rape trials.

1223. However, the Bill does not include details of the criteria by which the pilot is to be reviewed.

1224. There seemed to be some uncertainty among witnesses who gave evidence about what criteria would be used, and the extent to which the rate of convictions would be a relevant factor.

1225. Sheriff Andrew Cubie commented that—

> "It would probably be useful, in advance of the pilot, to have some kind of metrics for its success or otherwise. That is one of the concerns that the Sheriffs and Summary Sheriffs Association raised in relation to success and whether a crude measurement of acquittals or convictions would be used, whereas that is not the purpose of the pilot. Some clarification of that would be helpful."

1226. Professor Cheryl Thomas of UCL commented—

> "According to the bill, there is to be a review of the pilot, but how are you actually going to do that? What are the measure or measures going to be? Will the measure be the jury conviction rate in Scotland in comparison with the juryless trials conviction rate?

1227. There were also some comments made about the proposal to use secondary, rather than primary, legislation to set out more of the details of the pilot.

1228. Lord Matthews commented that—

> "It is not for me to say, but it may be that the Parliament could think about legislating in more detail, rather than leaving it to subordinate legislation. An act that set out the parameters of any pilot and said what should happen might be better and might carry more weight than subordinate legislation. That is a personal thought."

1229. The Cabinet Secretary explained the position regarding the assessment of the pilot in her appearance before the Committee on 7 February 2024 and in a supplementary letter to the Committee on 16 February 2024.

1230. The letter from the Cabinet Secretary noted that in 2022, a cross-sector Working Group was established to consider how to take forward Lady Dorrian's recommendation to hold a pilot of single judge rape trials. The Group developed a proposed model for the pilot which was published in December 2022.

1231. According to the Cabinet Secretary, the proposal is that, where possible, changes to existing processes for rape cases should be kept to a minimum in order to better understand the impact of changing the decision maker from a jury to a single judge.

1232. The letter from the Cabinet Secretary noted that the Working Group has identified that "the pilot's core objectives should be to—

1. assess how the process of conducting a single judge trial is perceived by those involved in the trial process. For example, do practitioners find there are differences in the way evidence is led, in cross-examination, or in how often judges intervene? Do accused people and complainers find written reasons for verdicts beneficial? How do complainers experience examination in chief and cross-examination?

2. explore the impact of single judge trials on the effectiveness and efficiency of managing rape trials. For example, are trials shorter? Are there any differences in frequency of adjournments, or in numbers of s.275 applications?

3. consider the impact of single judge trials on outcomes. For example, how often are guilty pleas entered, and when in the process? What is the conviction rate and what are the themes in reasons for convictions and acquittals, as set out in written reasons? What are the main reasons for any appeals lodged?"

1233. The letter from the Cabinet Secretary stated that—

> "The Working Group was clear that evaluation of the pilot should be weighted towards Objective 1. Its report noted that, "the primary (measurable) motivation behind the piloting of single judge trials is to improve the experience of complainers in sexual offence cases. While Objectives 2 and 3 are important,

these should be considered as being less significant in determining whether the pilot should be considered a success"."

1234. The letter from the Cabinet Secretary stated—

> "While it would not be appropriate to include detailed research questions in primary legislation, I am happy to consider whether we could amend the Bill to make explicit that the review of the pilot under section 66 would need to cover those three themes identified."

1235. The letter from Cabinet Secretary also noted that she would be willing to amend the Bill to include some additional details about the pilot—

> "While it is appropriate that procedural details be set out in regulations rather than in primary legislation, as our analysis and our engagement with partners progress I will undertake to amend the Bill to include more information on the pilot, to provide MSPs with greater clarity on key issues like the case criteria."

1236. As things stand, the case criteria (namely the types of rape cases to be included in the pilot), is not specified in the Bill. However, the Policy Memorandum notes that the Working Group on the pilot recommended that it should encompass all single complainer rape and attempted rape cases in which there are either no other charges on the indictment or in which those other charges are only minor or evidential. The Policy Memorandum noted that—

> "Single complainer cases were selected because concerns over jury decision making are most acute in these cases due to their typical characteristics."

Delegated powers

1237. The Delegated Powers and Law Reform Committee raised two issues with the Scottish Government about the power in section 65(1) for Ministers to make regulations to allow for the pilot.

1238. In its correspondence to the Scottish Government, the Delegated Powers and Law Reform Committee (DPLR) noted that MSPs may consider the power itself too broad, and that more limitations should be set out on the face of the Bill, such as specified criteria and the time-period of the pilot. The DPLR Committee also questioned whether this power had been drafted in such a way that it could be exercised more than once and asked whether this had been the intention of the Scottish Government in its drafting.

1239. On the first point, the Cabinet Secretary responded to the DPLR Committee to indicate that she intends to propose amendments to the Bill at Stage 2 to set out additional key information on the operational parameters of the pilot.

1240. On the second point, the Cabinet Secretary confirmed that the power had intentionally been drafted to allow it to be exercised more than once.

1241. She said that it would be possible for it to be used to run more than one pilot, but that is not the intention of the Scottish Government. The Cabinet Secretary explained that the Scottish Government is mindful that procedural reasons might arise that

mean new regulations are needed to support the operation of the pilot. She gave the example of where there are technical issues with the regulations that establish the pilot, or if there is a desire to conclude the pilot earlier than originally planned.

1242. In these scenarios, she said, it is likely that new regulations would be needed, and that is why the power has been intentionally drafted so that it may be used more than once.

1243. In light of the Cabinet Secretary's response, the Delegated Powers and Law Reform Committee made the following recommendations—

> "The Committee calls on the Scottish Government to bring forward amendments at Stage 2 which would limit the scope of the power, particularly regarding the "specified criteria" to which a trial must meet to fall under the scope of the pilot, and the time period of the pilot.
>
> The Committee also calls on the Scottish Government to bring forward amendments at Stage 2 which would make clear that the pilot can only run once, without limiting its ability to bring forward additional technical regulations in relation to the pilot should this be necessary."

Possible boycott

1244. We are aware that several bodies representing lawyers, including the Scottish Solicitors Bar Association, have voted to boycott any pilot of judge-only rape trials which take place as a result of the Bill, due to their concerns about the proposals.

1245. Simon Brown of the Scottish Solicitors Bar Association told us that the current polling of his membership is that 97 per cent will refuse to take part. He told us that "we cannot see any avenues through which the criminal legal bar would be prepared to take part in such a pilot scheme". He informed us that solicitors could not be legally compelled to take part in the pilot.

1246. The position is slightly different for the Faculty of Advocates where there is a 'cab-rank' rule, namely that advocates cannot discriminate between clients, and that they must take on any case provided that it is within their competence, they are available and appropriately remunerated. Tony Lenehan □C, speaking for the Faculty of Advocates, commented that—

> "Many of my members have expressed strong views, but the cab-rank rule means that if they declined to take instructions, that would be a matter that would have to be referred to the dean of faculty."

1247. The Cabinet Secretary indicated that she had had many discussions with organisations opposed to the pilot. She told us—

> "I deeply regret that some criminal defence lawyers feel so strongly that, at this time, they are talking about a boycott. I will continue to seek to engage as much as possible, and I will seek to work with people on the detail.

1248. She refuted suggestions that anything proposed in the pilot would undermine the rights of the accused but told us that she was open to dialogue on the arrangements

for the pilot, in order to give as much assurance as possible to those who have concerns. She commented that, given that parliamentary scrutiny is still underway, "I will not box myself or anybody else into a corner at this stage".

Conclusions and recommendations

1249. The proposed pilot scheme for criminal trials of rape or attempted rape by a single judge without a jury has been one of the most controversial provisions in the Bill. Lady Dorrian's review group were split on the issue, as were the Senators of the College of Justice. We heard from some organisations representing victims who strongly supported the proposal. However, other bodies representing the legal profession were strongly opposed. Some survivors expressed reservations about both the jury system and the prospect of judge-only trials.

1250. As a first step in considering this issue, we wanted to understand the reasons why the Scottish Government is proposing a pilot.

1251. In its policy memorandum, the Scottish Government recognises the higher acquittal rates for serious sexual offences cases than for other crimes. In its view, there is a compelling body of evidence that juries are influenced by rape myths. The purpose of the pilot is to, in the words of the Policy Memorandum, "assess matters and gather evidence".

1252. As might be expected, the reasons put forward by the Scottish Government in support of conducting a pilot have been subject to debate by those in favour and against the proposal.

1253. First, there has been debate about whether the conviction rates for sexual offences indicate there is a problem which needs to be addressed. In seeking to consider this issue, we discovered limitations in the data on conviction rates. It was only during our evidence-taking that it emerged that the conviction rate in rape trials with one complainer and one accused was "at about 20 to 25 per cent". This information was provided by the Lord Advocate, which we welcome, but no further details were given. It is also the case that conviction rates for rape appear to be higher in England and Wales than in Scotland, although we heard evidence that comparisons of conviction rates might be misleading (e.g. due to the possibility that a higher conviction rate may result from a more conservative approach to prosecuting cases rather than more victims receiving justice).

1254. It is clear to us that if the pilot is to go ahead then much improved data on conviction rates is needed. There must be clear baseline information in order to properly understand what changes may have occurred as a result of the pilot. At the moment, we are not confident this exists, at least publicly. We are not clear how a comparison is going to be made between trials that take place within the pilot and other similar cases that do not. We recommend that justice agencies work together in order to address the widespread concerns about the

lack of comprehensive data on conviction rates for rape and other sexual offences. This data should be published online in the interests of transparency.

1255. The second point to highlight is that there has been debate about the extent to which juries do, in fact, hold rape myths. Research by different academics has been cited both in support and against this proposition. We took evidence from Professor Cheryl Thomas on her research in England and Wales and, separately from the researchers who undertook the Scottish jury research. They are sometimes characterised as taking opposing positions on the question of whether juries hold rape myths. However, the researchers felt that the difference between their research may be overstated. They felt it may be advisable to consider the whole body of evidence in the field of jury research before reaching conclusions. Overall, it may be the case that all-jury research is subject to some limitations, to varying degrees and in different ways. There are questions therefore as to whether the academic evidence cited by the Scottish Government as underpinning its views is as clear as sometimes suggested.

1256. Turning now to the specific proposals in the Bill, we heard strong arguments both for and against the idea of a pilot. These are outlined in detail elsewhere in this report, but we set out a summary of these below.

1257. Those who did not support the pilot were concerned that it will involve real-life cases, with real-life consequences for the accused and the complainer. We heard criticism that the diversity inherent in juries would be lost and replaced by a single judge who in all likelihood, would fit a particular demographic. Furthermore, they argued that the judges involved would not be immune to their own biases and could also be prone to errors. Another view was that taking forward a pilot would be premature, given that the impact on conviction rates of recent changes to jury directions and corroboration requirements has not been assessed. Finally, we heard the view that judges involved in the pilot might feel under pressure to convict simply by virtue of taking part in the pilot.

1258. On the other hand, those in support of a pilot argued that it would provide a valuable means of gathering evidence in order to assess the long-standing and significant concerns they raised about how rape cases are dealt with in the justice system. The chance to receive written reasons for verdicts in rape trials from judges was particularly welcomed by them. Furthermore, in their view, the pilot would be a chance to assess whether a judge-led trial would lead to a different tone being adopted during cross-examinations which could reduce the trauma for witnesses. Finally, we heard reassurances from several witnesses that the proposed pilot would be compliant with the right to a fair trial in terms of the European Convention on Human Rights.

1259. All Members of the Committee are in support of the following conclusions and recommendations.

1260. First, we are concerned that the Bill contains no details of the criteria by which the pilot is to be reviewed. This has led to some uncertainty as to what criteria are to be used, and whether conviction rates will be one of the criteria. We received some clarification on this point from the Cabinet Secretary during the course of our scrutiny, namely that it is intended that the conviction rate will

be one of the criteria, but assessing the experience of complainers will be the primary consideration. We also note that the case criteria (namely the types of rape cases to be included in the pilot) is not specified in the Bill.

1261. We welcome the commitment made by the Cabinet Secretary to bring forward amendments to provide more information about the pilot on the face of the Bill. We recommend that these amendments provide more details about both the criteria for assessing the pilot and the criteria for cases to be included.

1262. Second, there has been some uncertainty as to which court the pilot would take place in. The Bill provides that it can take place in either the High Court or the new Sexual Offences Court. However, the Cabinet Secretary told us that a decision still had to be made, and the sequencing of the introduction of the proposals in the Bill will be important in this regard. She set out some provisional thinking when she gave evidence but stressed that no decisions had been made.

1263. Our view is that it is important that there is clarity as to the Scottish Government's plan regarding the timing of the implementation of each of the provisions in the Bill. For example, we need to know whether the judge-only pilot will be comparing differences with jury trials in the Sexual Offences Court or those in the High Court. We are also concerned to ensure that the methodology of any assessment of the pilot is not hindered by too many variables being introduced at the same time in the form of other changes to the justice system proposed in the Bill. In those circumstances, we would question how we would be able to assess the impact of the pilot alone.

1264. For all these reasons, we recommend that, ahead of Stage 2, the Scottish Government, sets out a clear timeline for the order in which it would propose to implement the various provisions in the Bill with indicative dates.

1265. Our preference is that the Scottish Government provides further evidence to Parliament on the detail of the pilot, including the assessment criteria, in the form of a report before any regulations are laid. Furthermore, Parliament would need time beyond the usual 40 days to consider any regulations for this Part and possibly make amendments. As such, they should be subject to the 'super affirmative' procedure and provided as drafts first for consultation by the relevant committees.

1266. Third, the Delegated Powers and Law Reform (DPLR) Committee has identified that the Bill provides that the pilot can be run more than once, although the Scottish Government has indicated that this is not its intention. We understand that this power has been included in case there are technical issues with the pilot which require new regulations. However, our position is that we are required to consider the wording of the Bill as drafted, and not to simply rely on what the Scottish Government's stated intentions might be. As drafted, the pilot could be run more than once which gives us some concerns. We support the call made by the Delegated Powers and Law Reform Committee that the Scottish Government should bring forward amendments to

make it clear that the pilot could only be run once, without limiting its ability to bring forward additional technical regulations if required.

1267. Finally, an idea was mentioned in evidence that an alternative to a single-judge trial would be a panel of judges. There is an argument that this might address some of the concerns which have been raised with us about vesting too much decision-making power in one person. The Cabinet Secretary appeared to be open-minded regarding this possibility. We invite the Cabinet Secretary to update us on the Scottish Government's thinking ahead of the Stage 1 debate.

1268. Having considered all of this evidence and acknowledging that the proposed judge only pilot is a significant departure from the long-established right of a person accused of serious crime to trial by a jury of their peers, some Members of the Committee[19] have reached the conclusion that the pilot should be supported, subject to a number of important safeguards. Those Members recognise that the principle of trial by jury for a serious crime should only be departed from for significant reasons and these Members consider that working to improve the experience of victims and complainers merits such a course of action. Those Members believe such a pilot is also justified given the evidence the Committee heard from the Lord Justice Clerk and the Lord Advocate. Those Members believe the pilot should proceed on the basis that it is time-limited for a period of no longer than 18 months. The concerns of the Delegated Powers and Law Reform Committee that a pilot could be run more than once due to the current drafting of the Bill, must be fully remedied by amendment at Stage 2. The basis for evaluation of the pilot must be expressly set out in the Bill by amendment at Stage 2. These Members consider that such a pilot will provide a unique and valuable opportunity to gather evidence on topics such as rape myths, experiences and perceptions of those involved in the trial process, it will create the opportunity to obtain written judgements from a judge, and measure outcomes such as early pleas and convictions in rape trials. Their view is that there is a need to take a bold approach to address these issues and a pilot would allow practical evidence to be obtained about an alternative model which could have the potential to deliver improvements.

1269. Other Members[20] are not persuaded that this this pilot should go ahead. In their view, this proposal represents a fundamental departure in Scots law from the long-established right of a person accused of serious crime to trial by a jury of their peers. These Members believe there is insufficient evidence to justify what would amount to an experiment with people's lives. They are also concerned that this will create a two-tier justice system, with a distinction between the crimes of rape and murder, which will still be heard by juries. These Members believe in the value of juries, which are a cornerstone of the justice system and which reflect wider society and comprise a broad range of life experiences. Furthermore, they agree with concerns that have been raised about the homogenous nature of the judiciary, particularly in respect of gender and ethnicity. These Members agree with witnesses who expressed concern about a lack of data about rape prosecutions and convictions generally, not

[19] Audrey Nicoll MSP, Rona Mackay MSP, Fulton MacGregor MSP and John Swinney MSP.
[20] Sharon Dowey MSP and Russell Findlay MSP.

least in relation to single-complainer cases. They are also mindful of the conflicting evidence about the prevalence and impact, or otherwise, of rape myths. These Members also believe that time needs to be given to assess the impact of directing juries about rape myths, which only began in September 2023 and on the potential impact on rape prosecutions following the High Court's October 2023 decision to overrule Smith v Lees 1997 JC 73. While the threats of a potential boycott by legal practitioners are unfortunate, their view is that they cannot be wished away as they could render the proposed pilot unworkable and should be meaningfully addressed by the Scottish Government. They believe it is important to recognise that some rape complainers expressed a preference for their cases being heard by a jury, rather than a single judge. They also have concerns about what they believe is a lack of clarity about the Scottish Government's intent about this proposal and about how it will be assessed. Furthermore, their view is that unanswered questions remain about the cost of any pilot and whether the required resources could potentially be better used to improve victims' experiences in other ways.

1270. Other Members[21] take the following view. Trial by jury for serious offences has been a tenet of Scots law for centuries. They would have expected the Scottish Government to come forward with robust proposals for a time limited single pilot with clear criteria and protections when proposing to set aside this right, and for the Committee to have the full opportunity to scrutinise those proposals. It should also be noted that this is not a pilot and would apply to real cases. These Members believe that women rape victims are failed by the justice system in rape cases, with complainers describing their experiences as retraumatising and citing the delays in the justice system as causing significant distress. However, from the evidence they have heard, the existence of the jury has not been one of the foremost issues that complainers have raised. These Members are concerned about proceeding with a 'pilot' when there is such polarisation of views, and are concerned about the impact this will have on public confidence, given that proposals are not fully developed, and believe it is more important to focus on other specific measures that will improve women's experience, such as independent legal representation and a single point of contact for rape victims. They also have concerns regarding the lack of diversity in the cohort of judges who will hear rape cases. They therefore do not support these proposals. If the provisions relating to the pilot proceed, a panel of three should be considered and a sunset clause will be essential.

[21] □aty Clark MSP and Pauline McNeill MSP.

GENERAL PRINCIPLES OF THE BILL

1271. The Victims, Witnesses, and Justice Reform (Scotland) Bill contains several substantial policy proposals which would implement significant reforms to the justice system in Scotland.

1272. In our report, we have discussed the reforms proposed in each of the Parts of the Bill in turn. We have reached conclusions and recommendations on the merits of the specific proposals in the Bill. On occasion, we have made recommendations as to how they could be improved.

1273. At various points in this report, the Committee has recommended that the Scottish Government should respond to various matters and set out its views to Parliament. This should be covered in the written response from the Scottish Government that we receive before the Stage 1 debate.

1274. At Stage 1, as lead committee, we are required to consider and report on the general principles of the Bill. The 'general principles' of the Bill are generally understood to refer to the main purposes of the Bill rather than its finer details.

1275. If Parliament supports the general principles of the Bill, it can proceed to Stage 2. However, if Parliament does not support the Bill's general principles, then it falls.

1276. As a Committee, we are content to agree the general principles of the Bill at Stage 1. The Bill contains proposals which are intended to improve the justice system for victims and witnesses. Not every Member supported every proposal in the Bill. Some Members have concerns about the extent of legal reform contained in one Bill and the potential unintended consequences of the cumulative effect of the system changes. There are some areas where we have recommended that further evidence, data and scrutiny is required. We have made a number of suggestions on how the Bill can be improved. Allowing the Bill to progress to Stage 2 enables such improvements to be made. For some Members, the final composition of the Bill at Stage 3 will determine whether they are ultimately able to support it.

ANNEX A: ORAL AND WRITTEN EVIDENCE

ORAL EVIDENCE

1. The Committee took oral evidence on the Bill between 27 September 2023 and 7 February 2024. The table sets out the meetings at which oral evidence was taken and which witnesses gave evidence. All oral evidence taken in public sessions is available in the Official Report.

2. This table also sets out the record of two informal sessions the Committee undertook with individuals who wished to share their experiences with the Committee in private.

Link to the Official Report	Witness who gave evidence to the Committee
Read the Official Report of Wednesday 27 September 2023 **Focussing on all parts of the Bill**	• **Cabinet Secretary for Justice and Home Affairs and Scottish Government officials**
Read the Official Report of Wednesday 04 October 2023 **Focussing on Parts 1, 2 and 3 of the Bill**	• **Ann Marie Cocozza,** Families and Friends Affected by Murder and Suicide (FAMS) • **Sandy Brindley**, Rape Crisis Scotland • **Dr Marsha Scott**, Scottish Women's Aid • **Kate Wallace**, Victim Support Scotland • **Dr Louise Hill,** Children 1st • **Bill Scott,** Inclusion Scotland • **Graham O'Neill,** Scottish Refugee Council
Read the Official Report of Wednesday 25 October 2023 **Focussing on Parts 1, 2 and 3 of the Bill**	• **Jonathan Campbell,** Edinburgh Bar Association • **Jamie Foulis,** Family Law Association • **Stuart Munro,** Law Society of Scotland
Read the Official Report of Wednesday 01 November 2023 **Focussing on Parts 1, 2 and 3 of the Bill**	• **Caroline Bruce,** NHS Education for Scotland • **Prof Thanos Karatzias,** Edinburgh Napier University and the Rivers Centre for Traumatic Stress • **Laura Buchan,** Crown Office and Procurator Fiscal Service • **Sue Brookes,** Scottish Prison Service • **Ch Super Derek Frew,** Police Scotland • **John Watt,** Parole Board for Scotland • **David Fraser,** Scottish Courts and Tribunals Service

Read the Official Report of Wednesday 15 November 2023 **Focussing on Parts 1, 2 and 3 of the Bill**	• **Cabinet Secretary for Justice and Home Affairs** and Scottish Government officials
Read the Official Report of Wednesday 29 November 2023 **Focussing on Part 4 of the Bill**	• **Eamon Keane,** University of Glasgow • **Professor Fiona Leverick,** University of Glasgow
Read the Official Report of Wednesday 06 December 2023 **Focussing on Part 4 of the Bill**	• **Mr Joe Duffy** • **Sandy Brindley,** Rape Crisis Scotland
Read the transcript of the Informal Evidence Session of Wednesday 06 December 2023 **Focussing on all parts of the Bill**	• **Witness 1** • **Witness 2** • **Witness 3** • **Witness 4**
Read the Official Report of Wednesday 13 December 2023 **Focussing on Part 4 of the Bill**	• **Ronnie Renucci KC,** Faculty of Advocates • **Stuart Munro,** Law Society of Scotland • **Stuart Murray,** Scottish Solicitors Bar Association • **Laura Buchan,** Crown Office and Procurator Fiscal Service • **Alisdair Macleod,** Crown Office and Procurator Fiscal Service
Read the Official Report of Wednesday 10 January 2024 **Focussing on Parts 5 and 6 of the Bill**	• **Rt Hon Lady Dorrian,** Lord Justice Clerk • **Rt Hon Dorothy Bain KC,** Lord Advocate • **David Fraser,** Scottish Courts and Tribunals Service • **Danielle McLaughlin,** Scottish Courts and Tribunals Service

Read the Note of the Informal Session on Tuesday 16 January 2024 **Focussing on all parts of the Bill**	• Three individuals who had a close family member lose their life because of a serious crime of a non-sexual nature
Read the Official Report of Wednesday 17 January 2024 **Focussing on all parts of the Bill (apart from the last panel which focused on Parts 4, 5 and 6 of the Bill)**	• **Jennifer McCann** • **Hannah McLaughlan** • **Ellie Wilson** • **Sarah Ashby** • **Hannah Stakes** • **Anisha Yaseen** • **Sandy Brindley,** Rape Crisis Scotland • **Kate Wallace,** Victim Support Scotland • **Dr Marsha Scott,** Scottish Women's Aid • **Emma Bryson,** Speak Out Survivors
Read the Official Report of Wednesday 24 January 2024 **Focussing on Parts 5 and 6 of the Bill**	• **Professor James Chalmers,** University of Glasgow • **Professor Vanessa Munro,** University of Warwick • **Professor Cheryl Thomas KC,** University College London Judicial Institute • **Tony Lenehan KC,** Faculty of Advocates • **Sheila Webster,** Law Society of Scotland • **Alan McCreadie,** Law Society of Scotland • **Simon Di Rollo KC**
Read the Official Report of Wednesday 31 January 2024 **Focussing on Parts 4, 5 and 6 of the Bill**	• **Rt Hon Dorothy Bain KC,** Lord Advocate • **Rt Hon Lord Matthews,** Scottish Judiciary • **Sheriff Andrew Cubie,** Scottish Judiciary • **Dr Andrew Tickell,** Glasgow Caledonian University • **Seonaid Stevenson-McCabe,** Glasgow Caledonian University
Read the Official Report of Wednesday 06 February 2024 **Focussing on Part 6 of the Bill**	• **Simon Brown,** Scottish Solicitors Bar Association

Read the Official Report of Wednesday 07 February 2024 **Focussing mainly on Parts 4, 5 and 6 of the Bill**	• **Cabinet Secretary for Justice and Home Affairs** and Scottish Government officials

Supplementary written evidence provided by witnesses giving oral evidence

3. The Committee requested and received various items of follow up or supplementary information from those witnesses who gave oral evidence. This supplementary information relates to various issues which arose during their evidence sessions. They are-

- Scottish Refugee Council - Various issues inc. COPFS data on adult and child victims of human trafficking SPS data on Vietnamese children in HMP- OI Polmont Children's Commissioner - Legal Opinion on the Implications of the U Illegal Migration Bill in Scotland
- Cabinet Secretary for Justice and Home Affairs - Audit of Previously Passed Legislation
- Cabinet Secretary for Justice and Home Affairs - Updates on previously passed legislation
- Cabinet Secretary for Justice and Home Affairs – Financial Memorandum costs on Sexual Offences Court and Trauma-informed practice.
- Law Society of Scotland - data relating to criminal proceedings in Scotland: 2020-2021 and criminal proceedings in England.
- Cabinet Secretary for Justice and Home Affairs – follow up to questions from oral evidence on Parts 1 – 3 of the Bill.
- Professor James Chalmers, Eamon eane, Professor Fiona Leverick and Declan McLean, University of Glasgow School of Law - on a history and comparative examples of majority verdicts in Scottish jury trials.
- Professor James Chalmers - on time limited pilot for single judge rape trials.
- Scottish Courts and Tribunals Service - Follow-up Evidence on Court Room Capacity and Projections
- Dr Andrew Tickell and Seonaid Stevenson-McCabe, Glasgow Caledonian University - Follow-up Evidence on Automatic Anonymity for Complainers in Sexual and other ualifying Offences

- Cabinet Secretary for Justice and Home Affairs - Not proven meta-analysis by Jackson et al Rights of audience in the Sexual Offences Court and Pilot of single judge trials
- Crown Office and Procurator Fiscal Service - Victims Commissioner and Retrial Provisions in England and Wales
- Crown Office and Procurator Fiscal Service – COPFS views on changes to jury majorities

WRITTEN EVIDENCE

OTHER COMMITTEES

4. The Finance and Public Administration Committee wrote to the Committee on 2 November 2023 regarding their consideration of the Financial Memorandum for the Bill.

5. On 27 October 2023, the Cabinet Secretary also received a letter from the Delegated Powers and Law Reform (DPLR) Committee, setting out various questions as part of their scrutiny of the Bill.

CALL FOR VIEWS ON THE BILL

6. The Committee undertook a public Call for Views between 19 June and 8 September 2023. The Committee received 262 written submissions, as follows.

54 submissions from named organisation
Aberdeenshire Health and Social Care Partnership - Criminal Justice Social Work Service, Kathleen Mowat
Action for Children Scotland, Ryan Mc uigg
Al Furqan Mosque, Dr Hirron Fernando
Barnardo's Scotland
Beira's Place, Isabelle Kerr
Brake, Lucy Straker
British Psychological Society
British Transport Police, Mantvydas Ragauskas
Children 1st, Lily Humphreys
Children and Young People's Commissioner Scotland

Criminal Justice Voluntary Sector Forum (CJVSF), Eilidh Shearer
Crown Office and Procurator Fiscal Service (COPFS)
Dumfries and Galloway Council, Catherine Knipe
Edinburgh Rape Crisis Centre, Melody McIndoe
Equality and Human Rights Commission, Martin Hayward
Equally Safe Edinburgh Committee, Linda Rodgers
Faculty of Advocates
Faculty of Advocates Criminal Bar Association
Families Outside, Sarah Rogers
HM Inspectorate of Prosecution in Scotland, Laura Paton
Hourglass, Danny Tatlow
JUSTICE Scotland
Law Society of Scotland, Law Society of Scotland
Manda Centre, The
Moray VAWG Partnership, Emma Plant
NHS Education for Scotland, Judy Thomson
NSPCC Scotland
The Open University in Scotland, Keith Robson
The Parole Board for Scotland, Colin Spivey
Police Scotland
Rape Crisis Scotland, Rape Crisis Scotland
RASASH, Dawn Kotschujew
Risk Management Authority (RMA), Mark McSherry (Chief Executive)
SafeTime Peer Support Group
Scottish Children's Reporter Administration
Scottish Community Safety Network, Kevin Chase

Scottish Courts and Tribunals Service
Scottish Criminal Cases Review Commission, Daniel Fenn
Scottish National Congress Steering Committee, Iain Lawson
Scottish Police Federation, David Kennedy
Scottish Prison Service
Scottish Solicitors Bar Association
Scottish Women's Aid, Louise Johnson
Scottish Women's Convention (SWC), Eilidh Young
Scottish Women's Rights Centre (SWRC), Sabrina Galella
Scottish Youth Parliament
Sheriffs Summary Sheriffs' Association, Sheriff Wendy Sheehan
Sheriffs Principal, Sheriff Principal D C W Pyle
Social Work Scotland
Stirling Council, Stirling Council
Supreme Courts of Scotland - Senators of the College of Justice
University of Manchester, UK, Dr Ruth Lamont
Victim Support Scotland
VOCFS-Victims Organisations Collaboration Forum for Scotland

Seven submissions from names individuals indicating what organisation they work for
Lynn Burns - Break the Silence
1 Pension Administrators Ltd, John Robson
Tickell, Dr Andrew and Stevenson-McCabe, Seonaid - Glasgow Caledonian University - The Campaign for Complainer Anonymity
Dr Lewis Ross - London School of Economics
Emily Stewart - Rape Crisis (Rape and Sexual Abuse Centre Perth inross)

Dr Stuart Waiton - University of Abertay
University of Stirling, Dr. Tom Kane - University of Stirling

Two anonymous submissions where the individual indicated who they work for
Expert Witness Services
Glasgow Pensioners for Independence

107 submissions from named individuals
Adrian C Grant
Alan D Hannan
Alan Davis
Alastair Fleck
Alex Thorburn
Alison Rollo
Angie Gibson
Angus Anderson
Anisha Yaseen
Ann Forbes
Ann Rayner
Anneli Carroll
Basil (Vassilis) Manoussos
Bill Whyte (Emeritus Professor of Social Work Studies in Criminal and Youth Justice University of Edinburgh)
Bob Thomson
Brian Carroll
Brian Watson
Caroline Gourlay
Chris Terrell
Colin Clark
Colin Duncan
Colin Grant
Colin Robison

Councillor Sandra Macdonald
Craig MacAonghais
Dave Llewellyn
David Albiston
David Holden
David Lorimer
David Taylor
Denny McCabe
Derek Rogers
Donald Coutts
Dr Daniel Wilkes
Dr J H R Calder
Dr John Wedderburn
Duffy family
Duncan McNeil
Duncan Strachan
DW Buchan
Edith Joan Davidson
Elaine Colley
Elsie Reid
Emily Stewart
Fiona Nicholson
Frank Roberts
Geoff Bush
George Caldow
Gordon Keane

Gordon Martin
Graham Fulton Russell, Emeritus Justice of the Peace
Graham Taylor
Harry Johnson
Iain Crichton
Ian Brotherhood
Ian foulds
Ian Rae
Ian Whyte
James Carson
James Wands
Jan Cowan
Jennie Kermode
Jock Wishart
John Brown
John Burke Friel
John Love
Kathryn Ramsay
Keith Brown
KEVIN WOODBURN
Kirstie Banerji
Kirsty Noble
Lesley McDade (Part 1) Lesley McDade (Part 2)
Lesley Mclarty
Lillian Slater

Lloyd □uinan
Margaret Brown
Matthew Young
Mennie, W Patrick
Michael Dunbar
Michael Loftus
Mo Workman
Mr Francis Donnelly
Neil McIntyre
Phil Riddel
Pippa Plevin
Professor James Chalmers, Eamon Keane, Professor Fiona Leverick and Professor Vanessa E Munro
Raymond Lorimer
Robert Hughes
Ron Murray
Ron Strathdee
Ronald James MBE
Ronald Melville
S Mackenzie
Sandy Brindley
Sarah Mckechnie
Sheriff Douglas Cusine □Updated□, Sheriff TAK Drummond KC, Alistair Bonnington, Douglas Mill
Sonja ross
Stephanie Morrison

Stephen Barty
Stephanie Taylor
Stephen Duncan
Terence Callachan
Tom Urquhart
Topher Dawson
Valerie Strathdee
W A Dale
William Gorman

92 anonymous submissions from individuals
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